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PARK'S
Banking Law of Georgia
AS AMENDED 1920
with the c+
Trust Company and State Depository Acts.
ANNOTATED

DIGEST OF DECISIONS
of the
Supreme Court and Court of Appeals of Georgia
on
Banks and Banking

Opinions of the General Counsel
of the
Georgia Bankers' Association
1910-1920

By
ORVILLE A. PARK
General Counsel of the Georgia Bankers' Association,
Compiler Park's Annotated Code of Georgia

Atlanta
THE HARRISON COMPANY
1920

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PREFACE.

Having been intimately connected as General Counsel of the Georgia Bankers' Association with the efforts which finally culminated in the passage of the Banking Act of 1919, I was requested shortly after the passage of the Act to prepare an annotated and indexed copy, noting particularly the changes in the law and the sources from which the various sections were derived.

I determined to broaden somewhat the scope of the work and to include the Trust Company Act with its several amendments, the law creating and regulating State depositories, and a few other statutes relating to banks. As comparatively few of the sections of the new Act had received judicial construction, it seemed best to make a separate digest of the decisions of the Supreme Court and Court of Appeals of Georgia on banks and banking. This digest is little more than a rearrangement of the notes in Park's Annotated Code of Georgia, particularly the General Note on Banks and Banking.

I had prepared for publication, at the instance of the Georgia Bankers' Association, the manuscript for a small volume of opinions given to members of the Association on questions of banking law, negotiable instruments and kindred topics. Having decided to annotate the banking law and to prepare the digest of decisions, it was thought best to include in the one volume the banking opinions, so that the bankers and bank attorneys of Georgia, for whose benefit primarily the work was undertaken, should have in one volume the banking law of Georgia with a sort of textbook on the general subject.

Unexpected delays in the completion of the manuscript and the printing of the book delayed its completion until shortly before the 1920 session of the General Assembly. A bill having been introduced early in the session at the instance of the Legislative Committee of the Georgia Bankers' Association to amend the Banking Act in a number of particulars, it was deemed wise to delay the publication until the fate of these amendments could be determined and to incorporate in the book such changes and amendments as might be adopted. This has been done.

Competent critics have pronounced the Georgia Banking Act of 1919 one of the most complete and modern adopted so far by any American State. The new Department of Banking created by it has been functioning successfully and satisfactorily since January 1, 1920. Like all new machinery, a little time is required for adjustment. It is earnestly hoped that this volume will make the law more readily available and better understood, and therefore will assist to some small extent in its successful operation.

ORVILLE A. PARK.

Macon, Georgia, August 20, 1920.

ABBREVIATIONS and CITATIONS.

/ or Ga.—Georgia Supreme Court Reports. Thus 76/218 or 76 Ga., 218, means the 76th volume of Georgia Supreme Court Reports, page 218.

App. or Ga. App.—Georgia Court of Appeals Reports.

Code §—Refers to sections of Park's Annotated Code of Georgia. The sections in this Code are the same as those of the Code of 1910, the additional sections in Park's Code being indicated by small letters in parentheses following the number of the sections.

P. C.—Vol. 6, Park's Annotated Code, the Penal Code. Sections in this Code are the same as in Vol. 2, Code of 1910.

U. S.—United States Supreme Court Reports, official edition.

L. Ed.—Lawyers' Edition United States Supreme Court Reports.

S. E.—Southeastern Reporter.

Fed.—Federal Reporter.

U. S. R. S.—United States Revised Statutes.

U. S. Comp. Stat.—United States Compiled Statutes.

References to the New York Act are to the sections of that Act as found in Morgan & Parker's New York Banking Law, 4th Ed., 1919.

References to the Alabama Law are to the official publication of the Alabama Banking Act of 1911 as amended.

The usual abbreviations of the official reports of the several States, of the National Reporter System, and of the several series of selected cases, are used.



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HISTORICAL NOTE.

Prior to the amendment of the Constitution of Georgia, adopted in 1891, conferring upon the Secretary of State the power to grant charters to banking companies, banks were incorporated under special acts of the Legislature; these special charters differing widely as to the powers and privileges conferred and as to the limitations and liabilities imposed.

The earlier legislation of a general character related, in large part, to bank bills and the powers of and limitations upon banks as banks of issue. As early, however, as 1832 an act was passed requiring banks to make semiannual returns to the Governor, giving certain information as to their condition. This act was amended in 1850, and as so amended continued to be practically the only general measure regulating banks until 1889, when the State Treasurer was made *ex-officio* Bank Examiner and required to make an examination of all banking corporations twice each year. The Act of 1894 substituted for the semiannual reports to the Governor not exceeding four statements a year to the State Bank Examiner, which statements were required to be published. Upon the adoption of the constitutional amendment above referred to, a general law for the incorporation of banks was enacted. This was superseded by the Act of 1893, which remained in force until the present law went into effect. The amendment of bank charters in certain particulars was authorized in 1896.

There was no considerable change in the law until the Bank Bureau Act of 1907 was adopted. This act, following in many particulars the National Bank Act, did much to create a modern banking system. Unfortunately, however, it left in force much of the old law which had been brought forward from the days when the principal function of banks was the issuance of circulating notes or bank bills. It made no attempt to harmonize previous laws. It was notably deficient in failing to impose any restrictions upon or require any supervision over the organization of a bank. In granting and amending charters under the Act of 1893, the Secretary of State had no discretion, but performed a

ministerial function only. Nor did the Bank Bureau Act make adequate provision for the liquidation of a bank and its administration in the event of insolvency. The old Acts of 1840 and 1842 authorized the forfeiture of charters in certain cases and the appointment of receivers to liquidate the banks when such forfeiture was had. These acts continued to afford the only machinery for administering the assets of a bank in the event of its failure.

The unsatisfactory condition of the banking laws after the passage of the act creating the Bank Bureau led the writer to say in the preface to the Georgia Bankers' Code (published in 1909) : "The banking laws of Georgia are in a very unsatisfactory, not to say chaotic, condition. No attempt to bring them into a systematic or harmonious whole has been made. There are numerous provisions, still the law of the State, which were applicable to the old banks of issue but which are now entirely archaic and useless. Other statutes have been enacted looking to the creation of banks of issue when Congress shall see fit to remove the ten per cent. tax on State bank notes. These are also laws, but whether applicable to banks as at present organized and to what extent remains to be decided. * * * Some of the legislative acts seem to have been passed in ignorance or disregard of existing laws, and some statutes have been amended or changed so often that it is difficult to determine what the present law really is. The Act of 1907 creating the Bank Bureau is the most serious attempt to regulate the business of banking which has been made in some years, but this act is very crude and unsatisfactory. It enacts as new provisions which were the law long before the Code of 1895. It apparently ignores other Code sections, leaving it in doubt as to whether they are still the law." This characterization of the law has been quoted with approval more than once by different State Treasurers in their efforts to secure the adoption of a more satisfactory banking code.

In 1911, by joint resolution, the General Assembly appointed a commission with authority to sit in vacation and prepare and submit a comprehensive banking act. This Commission invited the Legislative Committee of the Georgia Bankers' Association, of which Mr. Joseph A. McCord, of Atlanta, was the chairman, and the writer as the General Counsel of the Association, to meet with the Commission and assist it in its labors. To the writer was assigned the task of drafting the bill. In its preparation the laws of a number of States were carefully consid-

ered.* The sources of the bill as prepared were principally the Georgia law, the National Banking Act with its amendments, the Banking Laws of New York as revised in 1909, and the new Banking Act of Alabama adopted in 1911. The proposed act, as drafted and approved by the Commission, was introduced in both houses of the General Assembly at the session of 1912. The committees of the two houses to which the bill was referred held joint sessions and invited bankers and others interested to discuss the bill, which was considered and acted upon section by section. With numerous amendments it was reported favorably by the committees, and with a few minor changes passed the Senate. It came up for final consideration in the House on the last night of the second session, and on account of its length was tabled to make way for more urgent legislation. At almost every session of the Legislature since bills to amend the banking laws have been introduced, but comparatively few acts have been passed, and none of these has affected to any considerable degree the banking system, its supervision or regulation.

The Legislature in 1918 proposed an amendment to the Constitution, increasing the salary of the State Treasurer and making provision for the clerical and other expenses of his office. The amendment provided that it should take effect whenever a separate Department of Banking should be created and the Treasurer relieved of his duties as *ex-officio* State Bank Examiner. At the general election in 1918 this amendment was duly ratified by the people. This at last opened the way for a modern banking system under the control of a department charged alone with its supervision and direction.

The Legislative Committee of the Georgia Bankers' Association, coöperating with a like committee of the Country Bankers' Association, undertook to prepare and submit for the consideration of the General Assembly at the session of 1919 a complete banking code, designed to supersede all existing laws on banks and banking. The bill prepared by the Legislative Commission in 1912 was taken as the basis for the proposed act. Numerous changes were made so as to incorporate in the bill such new laws as had been enacted in Georgia since its preparation and to include also a number of provisions taken from the recent statutes of other States and from the Federal Reserve Act. The writer, as General Counsel for the Georgia Bankers' Association, with the assistance of Alexander W. Smith, Esq., of Atlanta, General Counsel for the Country Bankers' Association, undertook to per-

fect the bill. As finally submitted, it was approved by the Associations at their annual conventions. It was endorsed by the State Bank Examiner, and the Budget and Efficiency Commission. Some minor amendments were made as the result of hearings by the committees of the General Assembly, but with remarkably few changes the bill passed both houses almost unanimously and was approved by the Governor on August 19, 1919.

PART I.

The Banking Act of 1919 as Amended.

The Trust Company Act.

The State Depository Act.

Miscellaneous Statutes Affecting Banks.

AN ACT TO REGULATE BANKING IN THE STATE OF GEORGIA; TO CREATE THE DEPARTMENT OF BANKING OF THE STATE OF GEORGIA; TO PROVIDE FOR THE INCORPORATION OF BANKS, AND THE AMENDMENT, RENEWAL AND SURRENDER OF CHARTERS; TO PROVIDE PENALTIES FOR THE VIOLATIONS OF LAWS WITH REFERENCE TO BANKING AND THE BANKING BUSINESS; AND FOR OTHER PURPOSES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA AND IT IS HEREBY ENACTED BY AUTHORITY OF THE SAME, AS FOLLOWS:

ARTICLE I.

Preliminary Provisions.

§ 1. SECTION 1. Bank, Definition of.

The term "bank" as used in this act means any moneyed corporation authorized by law to receive deposits of money and commercial paper, to make loans, to discount bills, notes, and other commercial paper, to buy and sell bills of exchange, and to issue bills, notes, acceptances or other evidences of debt, and shall include incorporated banks, banking companies, trust companies and other corporations doing a banking business in this State, but shall not include private bankers, copartnerships or voluntary associations doing a banking business, or national banking associations, or building and loan associations or similar associations or corporations. The term "bank" shall include a branch bank unless the context indicates that it does not.

This definition is taken substantially from the New York Banking Law, § 2.

Under the Bank Bureau Act of 1907 trust companies authorized to receive deposits were put under the control of the State Bank Examiner and required to conform to the laws regulating banks. Code, § 2286. The same act excluded from such control private banks and bankers. Code, § 2311. Under Code, § 2346, the term "bank" included the "parent bank, its branches and agencies."

Other definitions:

"A bank is an institution for the custody and loan of money, the exchange and transmission of the same by means of bills and drafts, and the issuance of its own promissory notes, payable to bearer, as

currency; or for the exercise of one or more of these functions." 3 Am. & Eng. Enc. of Law, 2d ed., p. 789.

"Every incorporated or other bank, and every person, firm or company having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or for sale, shall be regarded as a bank or as a banker." U. S. Rev. Stat., § 3407.

"Having a place of business where deposits are received and paid out on checks and where money is loaned upon security is the substance of banking." Warren *v.* Shook, 91 U. S. 704.

"**National banks** are banking institutions created under the laws of the United States which are private associations authorized by Congress for the joint purposes of convenience and profit to the holders of United States bonds, and of furnishing the public with a convenient and uniform circulating medium." Linton *v.* Childs, 105 Ga. 569.

"A **savings bank** in the strict sense of the term is an institution the object of which is to receive and safely invest savings, thus affording to its depositors the advantages of security and interest for their money." 24 Am. & Eng. Enc. of Law, 2d ed., p. 1243.

"An institution receiving savings deposits and paying interest thereon and whose deposits are not subject to check is a savings institution under the laws of Georgia, whether such an institution has a capital stock or simply operates upon its deposits." Dottenheim *v.* Union Savings Bank & Trust Co., 114 Ga. 788.

"A **trust company** is a corporation created for the purpose of administering trusts and trust funds, acting as agent, trustee or other fiduciary capacity. It is not a bank though some of its business is closely akin to banking and many banks are also trust companies." 3 Am. & Eng. Enc. of Law, 2d ed., 791; Magee on Banks and Banking, p. 28.

§ 2. SEC. 2. Depositors.

The term "depositor" as used in this act means any person who shall deposit money or commercial paper in any bank, either on open account, subject to check, or to be withdrawn otherwise than by check, whether interest is allowed thereon or not, and shall include holders of demand and time certificates of deposit lawfully issued.

The courts have not agreed as to whether the holder of a certificate of deposit was to be classed as a depositor or a note holder of the issuing bank. The Supreme Court of Georgia, in Lamar *v.* Taylor, 141 Ga. 227, held that holders of certificates of deposit are depositors within the meaning of the provision imposing on stockholders a statutory liability for the payment of depositors. This section is intended to relieve all doubt as to the status of depositors. Under it, one depositing money is a depositor, whether he holds a certificate, collects interest, or deposits simply on open account subject to check.

"When money is placed in a bank on general deposit, the title to the money immediately passes to the bank, and the relation of debtor and creditor is created between the bank and the depositor. The moment the deposit is made, the credit of the banker is substituted for the money." McGregor *v.* Battle, 128 Ga. 577 (1).

"A bank is not liable for interest on funds held on general deposit in the absence of a special contract therefor." American National Bank *v.* Burke, 81 Ga. 597.

"Deposits of money in a bank do not constitute a case of naked deposit, the use of the money being a valuable consideration. A special deposit of a sealed package of money would be a naked deposit." Code, § 3496.

"By habitually receiving through its cashier, special deposits to be kept gratuitously for mere accommodation, a bank will incur liability for gross negligence in respect to any such deposits, received in the usual way." Chattahoochee Natl. Bank *v.* Schley, 58 Ga. 369.

"Subject to check" means subject to payment without limitation or restriction, except that the check must be presented to the bank within banking hours, on banking days." Dottenheim *v.* Union Savings Bank & Tr. Co., 114 Ga. 788.

§ 3. SEC. 3. Branch Banks.

Banks whose capital has been fully paid in and is unimpaired may establish branches in the cities in which they are located or elsewhere, after having first obtained the written approval of the Superintendent of Banks, which approval may be given or withheld by the Superintendent in his discretion, and shall not be given until he shall have ascertained to his satisfaction that the public convenience and advantage will be promoted by the opening of such branch.

Such branch banks shall be operated as branches and under the name of the parent bank, and under the control and direction of the board of directors and executive officers of said parent bank.

The board of directors of the parent bank shall elect a cashier, and such other officers as may be required to properly conduct the business of said branch, and a board of directors, or loan committee, who shall be responsible for the conduct and management of said branch but not of the parent bank, or of any other branch save that of which they are officers, directors, or committee.

At the time of the establishment of any branch the board of directors of the parent bank shall set aside for the exclusive use of the said branch such proportion of its capital [or surplus]* as may be required by the Superintendent of Banks; in no event less than is required for the organization of a bank in the city, town or village in which the branch shall be located. *Provided*, That the parent bank shall not by such assignment of a portion of its capital reduce the capital to an amount less than is required for the organization of a bank in the city, town or village in which said parent bank is located; [nor shall the parent bank by such assignment of a portion of its surplus reduce the surplus account to an amount less than twenty (20) per cent. of its capital.]*

*Words enclosed in brackets added by Act approved August 14, 1920.

Branch banks shall be taxed on the capital set aside to their exclusive use in the counties, municipalities and districts in which they are located, and the parent bank shall be relieved of taxation to the extent of the capital set aside for the exclusive use of such branches.

The general law for the incorporation of banks made no provision for branch banks. A number of the old charters granted by special acts of the Legislature authorized the establishment of branches, and the Act of 1859, appearing in the first Code (1863) as § 1433, provided that "the term bank includes the parent bank, its branches, if any, and agencies." This act has been brought forward in all the Codes, appearing in Park's Annotated Code as § 2346. The Act of 1862 (Code, § 2364) authorized suits against banks in any county in which an agency had been established. The General Tax Acts provide that all property used in operating a branch bank shall be returned for taxation in the county where such branch bank may be located. Code, § 991. But while the general law did not provide for branch banks, branches were established by a number of banks, and the right to establish them seems not to have been questioned. This section was intended to give branch banks a definite status and to provide for the method of conducting them and their relations with the parent bank. The requirement that a definite portion of the capital must be assigned to the branches is in keeping with the requirements of the U. S. Revised Statutes, § 5155, (§ 9695 U. S. Comp. Stat.) which provide that State banks having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, may be incorporated as national banks and may retain such branches.

§ 4. SEC. 4. Private Banks.

No private person, firm, or voluntary association engaged in the business of banking in this State, not subject to the supervision of the Superintendent of Banks, and no private corporation, except a bank duly chartered and organized under the laws of this State or under the Acts of Congress, shall make use of any office sign at the place where such business is transacted, having thereon any name importing a corporation, or the name of any city, town or county, or other words, indicating that such office or place of business is that of a regular chartered bank; nor shall such person, firm, or corporation make use of or circulate any letter-heads, bill-heads, blank notes, blank receipts, certificates, circulars, or any written or printed paper whereon such name importing a corporation, or name wherein the name of any city, town, or county is used, or any other words, indicating that such business is the business of a regularly chartered bank: *Provided*, That no private bank engaged in business at the time of the passage of this act shall be required to change the name adopted and in use by it.

No person, firm, or voluntary association, or private corporation, other than a regularly chartered and organized bank, shall

use the words "bank," "banker," "banking company," "banking house," or any other similar name indicating that the business done is that of a bank, either upon any office sign at its place of business or upon any of its letter-heads, bill-heads, blank notes, receipts, certificates, circulars, or any other written or printed paper, without also using therewith the words plainly written or printed, so that the same may be readily read, "Private Bank, Not Incorporated," and every person, firm, association, or private corporation other than a regularly chartered bank, advertising to receive, or receiving deposits, shall at the window or desk at which such deposits are received place a conspicuous sign with letters not less than one inch in height, upon which shall be printed the words, "Private Bank, Not Incorporated." *Provided*, That any private banker or bankers, engaged in the banking business at the time of the passage of this act, may continue to use, without further qualification or restriction, the word "banker" or "bankers," where the use of their names conveys unmistakably that they are not incorporated.

Code, § 2287, provides that any individual firm or corporation doing a banking business may prefix before its name the words "banking house of," and may affix after its name the words "bank or banker or bankers," while Code, § 2311, excludes private banks and bankers from the supervision of the State Bank Examiner. The Act of 1897, p. 59, provided for the examination of private banks, and further provided that private bankers should have stamped upon their stationery, letter-heads and envelopes the words "not incorporated." This act was repealed by the Act of 1898, p. 72. The prohibition on the use of the words "bank," "banking company," etc., by a private banker, unless he shall indicate that the bank is not incorporated, is substantially the same as the provision of the New York law, § 141. The National Bank Act contains a like prohibition of the use of the word "national" by banks other than national banking associations, § 5243, U. S. R. S.; § 9835 U. S. Comp. Stat.

"Any private person, firm, or unincorporated company who conducts the business of banking without a charter and without any special privilege or authority of law is a private banker. Such a bank has no capital stock, as is required for a regular bank. Deposits in such a bank are simply loans to the banker on his individual credit." Magee on Banks and Banking, p. 23.

§ 5. SEC. 5. Insolvency Defined.

A bank shall be deemed to be insolvent, first, when it can not meet its liabilities as they become due in the regular course of business; second, when the actual cash market value of its assets is insufficient to pay its liabilities to depositors and other creditors; third, when its reserve shall fall under the amount herein required and it shall fail to make good such reserve within thirty (30) days after being required to do so by the Superintendent of Banks.

Under the Bankruptcy Act of 1898, § 1, "A person shall be deemed insolvent * * * when the aggregate of his property * * * shall not at a fair valuation be sufficient in amount to pay his debts." The usual definition of insolvency, however, is "inability to pay debts as they become due in the usual course of business." Bouvier's Law Dictionary, p. 1602. This section combines both definitions and adds a third, under which a bank is deemed insolvent when it fails to make good its reserve. When a bank is in the condition described in this section, it is manifestly not in position to continue for long active operation. It should not accept additional deposits, and it is best for all parties that the control of its affairs pass out of its hands.

§ 6. SEC. 6. Surplus and Undivided Profits Defined.

The term "surplus" as used in this act means the portion or portions of the "undivided profits" which have been formally set apart by resolution of the board of directors and carried to surplus account on the books of account of the bank, as well as such amount as may be paid in by stockholders for the purpose of creating a surplus.

The term "undivided profits" as used in this act means the net profits as shown by the books of account of the bank, in addition to the "surplus," less such amount as may be held for the payment of current expenses, taxes, interest on savings deposits and dividends to stockholders.

Code, § 2277, which prohibited a bank from lending to one person, unsecured, more than ten per cent. of its capital and surplus, defined "surplus" to mean "the net profits of such bank."

ARTICLE II.

Department of Banking.

§ 7. SECTION 1. Department of Banking Created.

There is hereby created a Banking Department of the State of Georgia to be designated as the "Department of Banking," charged with the execution of all laws heretofore passed or which may hereafter be passed relating to banks as herein defined.

Under the Act of 1907, Code, § 2279, the enforcement of the banking laws was committed to a Bureau or Department of the State Treasury, just as the Comptroller of the Currency, charged with the enforcement of the national banking laws, is an officer of the Treasury Department of the National Government. The present act creates a separate Department of Banking similar to that of New York (New York Act, § 10) and to that established under the laws of most of the States which have adopted modern banking systems.

§ 8. SEC. 2. Superintendent of Banks.

The chief officer of the Department of Banking shall be known as the Superintendent of Banks. He shall be appointed by the Governor, by and with the advice and consent of the Senate. The first appointment hereunder shall be made at least ten days before this act takes effect, and the appointee shall discharge the duties of the office pending confirmation by the Senate.

The Superintendent of Banks shall hold office for the term of four years, and until his successor is appointed and qualified.

Under the Bank Bureau Act of 1907, Code, § 2280, the State Treasurer was *ex-officio* State Bank Examiner.

This section follows § 10 of the New York law.

§ 9. SEC. 3. Vacancies, How Filled.

In the event there shall be a vacancy in the office when the Senate is not in session, caused by death, resignation, disability, suspension or removal of the Superintendent of Banks, the Assistant Superintendent shall act, holding the office until the Senate convenes and a successor to the Superintendent of Banks is appointed and qualified. When the Assistant Superintendent shall hold the office of Superintendent, as herein provided, he shall receive the same salary, and give the same bond as herein provided for the Superintendent of Banks.

This section follows in substance § 14 of the New York law.

§ 10. SEC. 4. Qualifications of Superintendent.

The Superintendent of Banks shall be a man of good character and shall have at least five years active experience in the banking business. He shall not during his term of office be an officer or employee of any bank, or either directly or indirectly interested in any bank, and shall not carry on business as a private banker or be an employee of or interested directly or indirectly in any private bank. He shall not be or become indebted directly or indirectly to any bank as herein defined. The Governor shall immediately remove from office any Superintendent of Banks violating the provisions of this section.

Under the old law, the State Treasurer, being *ex-officio* State Bank Examiner, was not chosen by reason of any qualification for the discharge of the duties devolving on him as such Bank Examiner. It was provided, however, by Code, § 2285, that it should not be lawful for him or either of his assistants to be "an officer

or stockholder of any bank or firm doing a banking business or be engaged individually in banking in this State or elsewhere." Under the National Bank Act, § 329, U. S. R. S., § 501, U. S. Comp. Stat., the Comptroller of the Currency is prohibited from being interested in any association issuing currency under the laws of the United States.

This section is a combination of § 1 of the Alabama act and § 10 of the New York law so far as the same prescribe the qualifications of the Superintendent of Banks.

§ 11. SEC. 5. Salary of Superintendent.

The Superintendent of Banks shall receive a salary of six thousand (\$6,000.00) dollars per annum, to be paid in the same manner as the other expenses of the Department of Banking are paid. He shall receive no fees or perquisites for any official act, but the fees prescribed herein shall be collected by him and deposited to the credit of the Department of Banking, as hereinafter provided.

The salary of the State Bank Examiner, in addition to his salary as State Treasurer, was \$2,500. Code, § 2280.

The salary of the Superintendent of New York is \$10,000.00 (N. Y. Law, § 10) and that of Alabama \$5,000.00 (Ala. Act, § 1).

§ 12. SEC. 6. Oath and Bond of Superintendent.

Before entering upon the duties of his office, the Superintendent of Banks shall take an oath before the Governor or one of the justices of the Supreme Court to support the Constitution of the United States and the Constitution of the State of Georgia, and faithfully to execute the duties of his office, which oath shall be in writing and subscribed to by the Superintendent of Banks and filed of record in the Executive Office. He shall also give bond to the State of Georgia with security or securities approved by the Governor in the sum of fifty thousand (\$50,000.00) dollars, conditioned as follows:

(1) That he will faithfully discharge, execute, and perform, all and singular, the duties required of him, and which may be required by the Constitution and laws.

(2) That he will faithfully account for all moneys that may be received by him from time to time by virtue of his office.

(3) That he will safely deliver to his successor all books, moneys, vouchers, accounts and effects whatever belonging to said office.

The surety on the bond shall be a regular incorporated surety company or companies, qualified to do business in the State of

Georgia, and the premium on the bond shall be paid as other expenses of the Department of Banking are paid.

No additional oath or bond was required of the State Bank Examiner other than that taken and given by him as State Treasurer. Code, § 2281. The oath prescribed in this section is in almost the same words as that of the State Treasurer. Code, § 217. The State Treasurer was required to pay the premium on his own bond, but under the Constitutional amendment increasing the Treasurer's salary and providing for separating the Banking Department from the Treasury, the State pays the premium on the Treasurer's bond in the same way as is provided in this section for the payment of the premium on the Superintendent's bond. Acts 1918, p. 91.

Similar oaths and bonds are required in New York (N. Y. Law, § 10) and in Alabama (Ala. Act, § 1).

§ 13. SEC. 7. Superintendent, How Removed.

The Superintendent of Banks may be suspended or removed by the Governor, whenever the Governor has trustworthy information, to be judged of by him, that the Superintendent is insane or has absconded or grossly neglects his duties or is guilty of conduct plainly violative of his duties.

The grounds for removing the Superintendent are similar to those provided for the suspension of the State Treasurer. Code, §§ 221, 222.

The Superintendent of Alabama may be removed for substantially the same reasons. § 1, Ala. Act.

§ 14. SEC. 8. Superintendent's Office.

The Superintendent of Banks shall be provided with suitable apartments at the State Capitol, furnished at the State's expense. He shall reside at the Capital and shall keep his office open daily, Sundays and holidays excepted. He shall be furnished from time to time, necessary [equipment]* furniture, fuel, lights, and other proper conveniences for the transaction of the business of his office, the expense of which shall be paid by the State in the same manner as the expenses of other offices at the Capitol are paid.

No separate offices for the Banking Department were provided for the State Bank Examiner, the Department being conducted in the same offices as the Treasury Department.

A similar provision is found in the Alabama law, § 5.

§ 15. SEC. 9. Seal of Department of Banking.

The Secretary of State shall provide the Superintendent of Banks with an official seal. Any paper executed by him as such

*Inserted by Act of August 14, 1920.

Superintendent of Banks in pursuance of any authority conferred on him by law and sealed with his seal of office shall be received in evidence with the same effect as a duly recorded deed.

No provision was made for a seal of the Banking Department until the adoption of this law. This provision is taken substantially from § 11 of the New York Banking Law. A similar provision for a seal and the effect to be given to papers executed under seal is found in the National Bank Act, §§ 330, 884, U. S. R. S.; §§ 502, 1496 U. S. Comp. Stat.

§ 16. SEC. 10. Assistant Superintendent, Examiners, and Clerks.

The Superintendent of Banks shall appoint from time to time, with the right to discharge at will, an Assistant Superintendent who shall be *ex-officio* an Examiner, and such additional Examiners and office assistants as he may need to discharge in a proper manner the duties imposed upon him by law, provided that such appointments shall not extend beyond the term of office of the Superintendent of Banks making such appointments.

No person so appointed shall during his term of office be an officer or employee of any bank, or either directly or indirectly interested in any bank. He shall not carry on business as a private banker or be an employee of or interested directly or indirectly in the business of any private banker. He shall not be or become indebted directly or indirectly to any bank, as herein defined. The Superintendent of Banks shall immediately remove from office any Assistant Superintendent, Examiner, or Office Assistant violating the provisions of this section.

The Assistant Superintendent, Examiners and clerks shall perform such duties as may be assigned to them, respectively, by the Superintendent of Banks.

This provision is quite similar to the power given to the State Bank Examiner to appoint his assistants. Code, § 2282. The present section is, however, fuller, especially with regard to the qualifications of the Assistant Superintendent and Examiners.

§ 17. SEC. 11. Oath and Bond of Assistant Superintendent and Examiners.

The Assistant Superintendent and each of the Examiners shall take the same oath as that herein prescribed for the Superintendent of Banks, and each shall give a bond to be approved by the Superintendent, with a regular incorporated surety company qualified to do business in the State of Georgia,

as security, payable to the State of Georgia, in the penal sum of ten thousand (\$10,000.00) dollars, with the same conditions contained in the bond as those herein prescribed for the Superintendent of Banks, the premium on which said bonds shall be paid as other expenses of the Department of Banking are paid.

The requirement as to oath and bond of the Assistant and Examiners is similar to that provided under the former law. Code, § 2283. The amount of the bond, however, is increased from \$5,000.00 to \$10,000.00.

§ 18. SEC. 12. Salaries of Assistant Superintendents, Examiners, and Clerks.

The Assistant Superintendent shall be paid a salary of thirty-six-hundred (\$3,600.00) dollars per annum.

Each of the Examiners shall be paid a salary of not exceeding twenty-four hundred (\$2,400.00) dollars per annum.

The salaries of the Clerks and Office Assistants shall not exceed in the aggregate the sum of [five thousand (\$5,000)]* dollars per annum.

Under the former law as amended, the salary of the first assistant was \$2,000.00 and of the Examiners \$1,800.00 each. Code, § 2283. The State Bank Examiner was also authorized to employ clerical assistants in addition to the Examiners. Code, § 2284 (a, b).

§ 19. SEC. 13. Traveling Expenses.

The traveling expenses of the Superintendent of Banks, the Assistant Superintendent, and the Examiners, actually paid in the discharge of their duties, shall be audited and approved by the Superintendent of Banks, and paid monthly as other expenses of the Department of Banking are paid. Itemized statements shall be kept by the Superintendent and Examiners, showing in detail their expenses and each and every item thereof, in such form and accompanied by such vouchers as the Superintendent shall prescribe, which statements shall be filed in the office of the Superintendent.

This is substantially the same as the Alabama law, § 4.

§ 20. SEC. 14. Expenses of the Department of Banking, How Paid.

All the expenses incurred in and about the conduct of the business of the Department of Banking, including the sal-

*Increased from \$3,600.00 by Act of August 14, 1920.

aries of the Superintendent of Banks, the Assistant Superintendent, the Examiners, and office assistants, and the traveling expenses incurred in examining banks, except the office expenses [including printing, postage, stationery and office supplies, telephone and telegraph tolls]* provided for in section 8 of this Article, shall be collected from the banks as hereinafter provided. All amounts so paid shall be deposited by the Superintendent of Banks in such bank or banks as he may see fit and subject to his check as such Superintendent, and shall be used for the expenses of the Department of Banking only.

Under the former law, the State Bank Examiner kept the funds of the Banking Department separate from the funds in the State Treasury. No provision was made, however, for auditing the expense accounts of the Examiners or for the deposit and disbursement of the funds collected.

§ 21. SEC. 15. Report of the Superintendent of Banks.

The Superintendent of Banks shall make an annual report to the Governor on or before the 31st day of December, which report shall be filed in his office, and by him laid before the General Assembly in connection with his first annual message thereafter.

This is practically a reenactment of Code, § 2294.

§ 22. SEC. 16. Contents of the Report.

The Superintendent of Banks shall set forth in his annual report:

1. A list of all the banks subject to his supervision, with the date when each began business.
2. A summary of the condition of every bank, as shown by the last report received in response to call and such condition as shown by the last examination made, and such other information in relation to said bank as in his judgment may be useful.
3. A statement of all applications for incorporation of new banks and of all applications for the amendment, renewal, and surrender of charters, together with his action thereon.
4. A statement of all banks whose business has been closed during the year.
5. A list of all banks taken possession of by him during the year, and of the dividends paid to creditors of all banks being liquidated, and of the unclaimed and unpaid deposits or dividends of each of such banks.

*Inserted by Act of August 14, 1920.

6. Any suggestion for amendments to the laws relating to banking by which the system may be improved and the security to the depositors and other creditors increase.

7. The names and compensation of his Assistant, Examiners, and Clerks, and the whole amount of the expenses of the banking department during the year.

8. An itemized statement of the amounts collected from the banks from examinations, fines, and forfeitures during the year.

This is largely a reenactment of § 2296, there being added the provision as to applications for incorporation, amendment, renewal and surrender of charters and as to banks taken possession of by the Superintendent and the amounts collected from banks for examinations, etc. A similar provision is found in the New York Act, § 83. A report of like character is required of the Comptroller of the Currency with regard to national banks under the National Bank Act, § 333, U. S. R. S.; § 505 U. S. Comp. Stat.

§ 23. SEC. 17. Copies of Report Furnished to Banks.

The annual report of the Superintendent of Banks shall be published in book form, and a copy thereof furnished to each bank by mail as soon as the same shall have been published and transmitted to the Governor. [The expense of publishing and mailing such reports shall be paid as other expenses of the Department of Banking are paid.]*

This is substantially a reenactment of Code, § 2297.

§ 24. SEC. 18. Rules for the Department of Banking.

The Superintendent of Banks shall make such rules and regulations to carry out the provisions of this act as he may consider of value to the Department of Banking. He may appoint special Examiners, when occasion requires, prescribe their duties, and limit their powers. He shall prescribe and provide forms, and supply the necessary blanks for examinations and reports.

This section combines Code §§ 2298 and 2310.

§ 25. SEC. 19. Reports and Examinations.

The reports of all examinations and the reports made by banks in response to the calls made by the Superintendent of Banks shall be regularly filed and preserved by the Superintendent of Banks in his office for a period of five (5) years, after which time the Superintendent shall be authorized to burn the same.

This is a reenactment in substance of Code, § 2312.

*The sentence enclosed in brackets stricken by Act of August 14, 1920.

§ 26. SEC. 20. Reports as Evidence.

Every official report made by the Superintendent of Banks and every sworn report, duly verified, of any regular or special Examiner duly appointed by the Superintendent of Banks, shall be *prima facie* evidence of the facts therein stated, in any action or proceeding wherein such bank is a party, provided that the reports of such examinations shall not be made public except when required in legal proceedings. [The expense of furnishing certified copies of records and reports by the Superintendent of Banks shall be paid by the person applying for such certified copies before such copies are delivered, except where such copies are called for on behalf of the State.]*

A similar provision is made in the National Bank Act, § 884, U. S. R. S.; § 1496 U. S. Comp. Stat.

§ 27. SEC. 21. Liability for Nonperformance of Duty.

The Superintendent of Banks, the Assistant Superintendent, and the Examiners shall be liable on their official bonds to any person, firm, or corporation injured on account of the failure of the Superintendent, the Assistant Superintendent, or any Examiner, to faithfully discharge the duties of his office. Suit may be brought thereon in any court of competent jurisdiction in the name of the State for the use of the injured party.

This section is taken from the Alabama Law, § 34.

§ 28. SEC. 22. Solicitors-General to Represent Superintendent.

The Solicitors-General, in their several circuits, when requested by the Superintendent of Banks, shall, as a part of their official duties, represent the Superintendent of Banks in any suit that the Superintendent may desire to bring, or that may be brought against the Superintendent under the provisions of this act, in regard to banks in their respective circuits. The fees of the Solicitors-General for services rendered under this section shall be fixed by the Superintendent subject to the approval of the judge of the Superior Courts in which such suits are brought. Such fees and the costs of any such suits or proceedings by or against the Superintendent of Banks shall be taxed by the judge of the Superior Court in which such suit is brought either against

*Added by Act of August 14, 1920.

the opposite party to such suit, or against the bank concerning which the suit is brought, or against the Superintendent, in which latter event such costs and fees shall be paid as other expenses of the Department of Banking are paid.

Under the Constitution, it is the duty of the Solicitor-General to represent the State in all cases in the Superior Courts of his circuit. Code, § 6531. The National Bank Act requires that suits and proceedings arising out of that act, in which the United States or any of its officers or agents shall be parties, shall be conducted by the district attorneys under the supervision and direction of the Solicitor of the Treasury. § 380, U. S. R. S.; § 556, U. S. Comp. Stat. In Alabama the circuit solicitor and the county solicitor of each county are required to represent the Superintendent without compensation. § 49, Ala. Act.

§ 29. SEC. 23. Attorney-General and Solicitors-General to Advise Superintendent.

It shall be the duty of the Attorney-General to advise the Superintendent of Banks on any question of law submitted to him by the Superintendent, and it shall likewise be the duty of the Solicitors-General, in their several circuits, when requested by the Superintendent of Banks, to advise the Superintendent on any question of law submitted to them by the Superintendent in regard to any existing or proposed banks in their respective circuits.

Under the Constitution, it is the duty of the Attorney-General to act as legal advisor of the Executive Department. Code, § 6529, § 254. Under the Alabama law the circuit and county solicitors are required to advise the Superintendent. § 49, Ala. Act.

ARTICLE III.

Examinations of Banks.

§ 30. SECTION 1. Semiannual Examinations.

The Superintendent of Banks shall either personally or by one of the Examiners visit and examine every bank subject to his supervision at least twice in each year. On every examination, inquiry shall be made as to the condition and resources of the bank, the mode of conducting and managing its affairs, the manner of keeping its accounts and the correctness thereof, the actions of its directors, the investment of its funds, the safety and prudence of its management, and whether the requirements of its charter and the law have been complied with in the administration of its

affairs, and as to such other matters covered by this act as the Superintendent of Banks may prescribe.

The first act in Georgia requiring the examination of banks was the Act of 1889, p. 65, which constituted the State Treasurer *ex-officio* Bank Examiner and required him to make an examination of each bank twice in each year. The above section follows closely Code, § 2299, taken from the Bank Bureau Act of 1907. A similar provision is found in the New York law, § 39, and in the Alabama law, § 7. All of these acts and the similar acts of most of the States are based on the National Bank Act, § 5240, U. S. R. S.; § 9832 U. S. Comp. Stat.

§ 31. SEC. 2. Special Examinations.

In addition to the regular semiannual examinations the Superintendent of Banks has power and it shall be his duty in like manner to examine, or cause to be examined, any bank under his supervision whenever in the judgment of the Superintendent of Banks the management and condition of the bank is such as to render an examination of its affairs necessary or expedient, or whenever in the opinion of the Superintendent of Banks the interests of the public demand an examination.

This provision is new in Georgia, though there is little doubt but that the State Bank Examiner was authorized to make special examinations whenever in his judgment it was necessary, Code, § 2299, providing that examinations should be made "twice in each year and oftener if necessary." The section follows the language of § 7 of the Ala. Act.

§ 32. SEC. 3. Examinations on Oath.

The Superintendent of Banks and the Examiners shall have power and authority to administer oaths and to examine under oath any person whose testimony may be required on the examination of any bank, and shall have the authority and power to compel the appearance and attendance of any such person for the purpose of such examination.

If any person when required so to do by the Superintendent of Banks, or any one of the Examiners, shall fail or refuse to appear or to testify under oath as herein provided, such failure or refusal may be reported in writing to the judge of the Superior Court of the county in which such bank is located, who shall thereupon cause a subpoena to be issued by the clerk of said court requiring such person to so attend and testify, and for failure to obey such subpoena the person so failing shall be adjudged in contempt of court by the judge of said court and punished accordingly.

Similar authority was given the State Bank Examiner by Code, § 2299. The language of this section follows closely § 7 of the Alabama law.

§ 33. SEC. 4. Written Report of Examination.

The Superintendent of Banks and the Examiner who shall make an examination of any bank shall reduce the result thereof to writing in such form as shall be prescribed by the Superintendent, which shall contain a full, true, and correct statement of the condition of such bank so examined, which reports shall be filed in the Department of Banking.

This section is a reenactment in substance of a portion of Code § 2299.

§ 34. SEC. 5. Fees for Examination.

Each bank shall pay for each semiannual examination to the Superintendent of Banks, to be deposited by him to the credit of the Department of Banking, as hereinbefore provided, in proportion to the capital, surplus and undivided profits, exclusive of branches, not exceeding the following amounts:

Where the capital, surplus and undivided profits is \$25,000.00 or less, \$20.00.

Where the capital, surplus and undivided profits is more than \$25,000.00 and not exceeding \$50,000.00, \$30.00.

Where the capital, surplus and undivided profits is more than \$50,000.00 and not exceeding \$75,000.00, \$40.00.

Where the capital, surplus and undivided profits is more than \$75,000.00 and not exceeding \$100,000.00, \$50.00.

Where the capital, surplus and undivided profits is more than \$100,000.00 and not exceeding \$125,000.00, \$60.00.

Where the capital, surplus and undivided profits is more than \$125,000.00 and not exceeding \$150,000.00, \$70.00.

Where the capital, surplus and undivided profits is more than \$150,000.00 and not exceeding \$175,000.00, \$80.00.

Where the capital, surplus and undivided profits is more than \$175,000.00 and not exceeding \$200,000.00, \$90.00.

Where the capital, surplus and undivided profits is more than \$200,000.00 and not exceeding \$225,000.00, \$100.00.

Where the capital, surplus and undivided profits is more than \$225,000.00 and not exceeding \$250,000.00, \$110.00.

Where the capital, surplus and undivided profits is more than \$250,000.00 and not exceeding \$275,000.00, \$120.00.

Where the capital, surplus and undivided profits is more than \$275,000.00 and not exceeding \$300,000.00, \$130.00.

Where the capital, surplus and undivided profits is more than \$300,000.00 and not exceeding \$500,000.00, \$150.00.

Where the capital, surplus and undivided profits is more than \$500,000.00 and not exceeding \$750,000.00, \$200.00.

Where the capital, surplus and undivided profits is more than \$750,000.00 [and not exceeding \$1,000,000.00]* \$250.00.

[Where the capital, surplus and undivided profits is more than \$1,000,000.00 and not exceeding \$1,500,000.00, \$300.00.

Where the capital, surplus and undivided profits is more than \$1,500,000.00 and not exceeding \$2,000,000.00, \$350.00.

Where the capital, surplus and undivided profits is more than \$2,000,000.00, \$400.00.]*

In addition to the fees hereinabove fixed each bank operating branch offices or banks shall pay for each branch so operated for each semiannual examination, at the above rates based on the capital, surplus, and undivided profits employed in such branch.

For any examination herein provided to be made before permit to begin business is issued, or on any amendment to a charter, or on any consolidation or merger, or on any voluntary liquidation, and in all other cases of like character, other than regular semi-annual examinations, a fee of \$25.00 shall be paid for each examination.

The scale of fees paid by banks for examinations has been changed several times. The scale here prescribed slightly increases the amounts paid under the Act of 1914; Code, § 2300.

Heretofore no fee has been fixed for the examination of a branch bank, and no provision has been made for special examinations made before business is begun or on the amendment or renewal of a charter, etc.

§ 35. SEC. 6. FEES, HOW COLLECTED.

In the event any bank should fail or refuse to pay on demand the amount herein fixed as fees for examinations, the Superintendent of Banks shall forthwith issue an execution in the name of the State against such bank for the amount of such fees, which shall be enforced in like manner as executions issued by the Superior Courts of this State upon judgments rendered by them.

Under the Alabama law, § 6, a penalty of \$5.00 for each day is assessed against banks making default in payments, and the Superintendent is authorized to collect the amount by suit. The

*Added by Act of August 14, 1920.

provision of this section authorizing the immediate issuance of execution is decidedly better.

§ 36. SEC. 7. Record of Fees.

It shall be the duty of the Superintendent of Banks to keep a record of all fees collected by him, together with a record of expenses incurred in making examinations of all banks, which record shall be embodied in his annual report to the Governor.

This is substantially a reenactment of Code, § 2308.

§ 37. SEC. 8. Examinations Not at Stated Times.

The Superintendent of Banks shall not visit any bank or cause same to be visited by an Examiner for the purpose of examination at stated or regular times, nor shall the Superintendent or any Examiner permit any one to know when or at what time he will visit any bank or cause same to be visited, for examination.

This section is copied from § 11 of the Alabama law.

§ 38. SEC. 9. Information Kept Secret.

The information which shall be obtained by Superintendent of Banks or any Examiner in making examinations into the affairs of any bank shall be for the purpose of ascertaining the true condition of said bank, and shall not be disclosed by the person making the examination, unless called upon to testify concerning the same in a court of justice, except that reports shall be made of the condition of the affairs of the bank examined and to the Superintendent of Banks, and a summary thereof published in the Superintendent's annual report, and except that the Superintendent may take action as the result of such examination as herein provided. *Provided, however,* That upon the request of the Federal Reserve Bank the Superintendent shall be authorized to furnish to said bank a copy of the report and other information concerning the condition and affairs of any bank which shall be a member of the Federal Reserve System; [and provided further, that the Superintendent of Banks may in his discretion confer and exchange information with the Comptroller of the Currency of the United States and National Bank Examiners and may when he shall deem it to be for the interest of the bank in question discuss its affairs with other banks or persons interested therein or affected thereby.]*

*Added by Act of August 14, 1920.

The body of this section is copied from § 12 of the Alabama law. The Act of 1918, p. 134, authorized the Superintendent to furnish a copy of his report of examination of any bank, which is a member of the Federal Reserve System, to the Federal Reserve Bank. Congress, by the Act of June 21, 1917, authorized the Directors of the Federal Reserve Bank to accept examinations made by State authorities in lieu of examinations made by Examiners selected by the Federal Reserve Board required under the Federal Reserve Act whenever the Directors approved such examinations. § 9792 (6), U. S. Comp. Stat.

§ 39. SEC. 10. Reports as Evidence.

In the event the Superintendent of Banks takes charge of the business and affairs of any bank as herein authorized, or in the event proceedings are instituted to forfeit the charter of any bank, duly authenticated copies of the reports of the examination of such bank on file in the office of the Superintendent of Banks may be used in any court as evidence and as an aid in arriving at the true condition of the bank. Such reports shall be received in any court as *prima facie* evidence of the truth of their contents.

With slight change in phraseology, this section is copied from § 14 of the Alabama law. Section 59 of the New York Act is practically identical.

ARTICLE IV.

Reports of Banks.

§ 40. SECTION 1. Stated Reports.

Every bank shall make at least four (4) reports each year, and oftener if called upon by the Superintendent of Banks, according to the form which may be prescribed by him, verified as true and correct by the oath or affirmation of the president or cashier, and accompanied by the certificate of at least two (2) of the directors of such bank to the effect that they have carefully read said report and that the same is true and correct according to the best of their information, knowledge and belief, and that the signature of the president or cashier, is the true and genuine signature of such officer. Such report shall exhibit in detail and under appropriate heads the resources and liabilities of such bank at the close of business on any past date specified by the Superintendent of Banks, and shall be transmitted to the Superintendent of Banks within ten (10) days after [date]* of a request therefor from him, and shall

*"Receipt" changed to "date" by Act of August 14, 1920.

be published in such form as the Superintendent of Banks may prescribe, within ten (10) days after the same is called for, in a newspaper published in the city or town where such bank is located, or if no newspaper is published in such city or town, then in the county in which such bank is located, and if no newspaper is published in the county, then in some newspaper having a general circulation in the county, such publication to be at the expense of the bank, and proof that such publication has been made, in such form as may be required by the Superintendent of Banks, shall be furnished to him within five (5) days after such publication is made.

This is a substantial reenactment of Code, § 2288, except that under that section the report was required to be "attested by the signature of at least two of the directors," this section substituting the certificate for the simple attestation. Code, § 2288, is in substantially the same language as the National Bank Act, § 5211, U. S. R. S., as amended; § 9774, U. S. Comp. Stat. By the Federal Reserve Act of December 23, 1913, as amended by the Act of June 21, 1917, Congress provided that State banks becoming members of the Federal Reserve System shall make reports of their condition to the Federal Reserve Bank of which they become members, not less than three such reports being required to be made annually on call of the Federal Reserve Bank on dates to be fixed by the Federal Reserve Board. § 9792, U. S. Comp. Stat.

§ 41. SEC. 2. Special Reports.

The Superintendent of Banks shall have power to call for special reports from any bank, whenever in his judgment the same are necessary in order to obtain a full and complete knowledge of its condition. Such reports shall be made on forms furnished by the Superintendent of Banks, and shall be verified and certified as herein provided in the case of stated reports.

This section is also taken from Code, § 2288.

§ 42. SEC. 3. Call for Reports Mailed to Banks.

A copy of each call made by the Superintendent of Banks for a report from the banks under the supervision of said Superintendent shall be mailed to each bank, and such mailing shall be deemed legal notice of such call.

This is substantially a reenactment of Code, § 2309.

§ 43. SEC. 4. Dividends to Be Reported.

In addition to the reports required in the preceding sections, each bank shall report to the Superintendent of Banks within ten

(10) days after declaring, and at least ten (10) days before paying, any dividend, the amount of such dividend and the amount of the surplus and undivided profits in excess of such dividend. Such report shall be verified and certified in the same manner as it is provided herein in the case of stated reports to the Superintendent of Banks.

This section follows closely the National Bank Act, § 5212, U. S. R. S.; § 9776, U. S. Comp. Stat. It, however, requires that the report shall be mailed to the Superintendent at least ten days before the payment of the dividend, which is not required by the National Bank Act. By the Federal Reserve Act, as amended by the Act of June 21, 1917, Congress provided that State banks becoming members of the Federal Reserve System shall report payment of dividends to the Federal Reserve Bank of which they are members. § 9792 (4), U. S. Comp. Stat.

§ 44. SEC. 5. Penalty for Failing to Report.

Any bank which fails to make and transmit or to publish any report as required by this act shall be subject to a penalty of \$10.00 for each day after the periods, respectively, herein mentioned that it delays to make and transmit its report or proof of publication.

Whenever any bank delays or refuses to pay the penalty herein imposed for the failure to make and transmit or to publish its report, the Superintendent of Banks is hereby authorized to issue an execution against such bank for the amount of such penalty, which shall be enforced in like manner as executions issued by the Superior Courts of this State upon judgments.

All penalties collected shall be held by the Superintendent of Banks as other funds collected and deposited to the credit of the Department of Banking.

Under Code, § 2289, the penalty for failure to report was \$50.00 for each day, and the State Bank Examiner was authorized to maintain an action in the name of the State against the delinquent bank for the recovery of the penalty. The penalty imposed on National Banks for such failure is \$100.00 per day. § 5213, U. S. R. S.; § 9777, U. S. Comp. Stat.

ARTICLE V.

Communications from Department of Banking.

§ 45. SECTION 1. Notice of Violation of Law.

If it should appear to the Superintendent of Banks that any bank has violated its charter or any law of the State or any order or regulation of the Department of Banking, he may, by an order under his hand and official seal, addressed to such bank, direct the discontinuance of such violation, or if it should appear to the Superintendent that any such bank is conducting business in an unsafe or unauthorized manner, he may in like manner direct the discontinuance of such unsafe and unauthorized practices. Such order shall be read at a meeting of the directors called for the purpose, and a copy thereof shall be entered upon the minutes of said board, and a majority of the board of directors, over their own signatures, indorsed on said original order, shall acknowledge that the same has been read at a meeting of the board and entered upon the minutes and said original order shall be forthwith returned to the Superintendent of Banks.

This is taken substantially from § 56 of the New York act.

§ 46. SEC. 2. Communications to Be Read and Entered on Minutes.

Each official communication directed by the Superintendent of Banks to a bank, pertaining to an investigation or examination conducted by the department, or to the affairs of such bank, or containing orders, suggestions, or recommendations as to the conduct of the business thereof, shall be submitted, by the officer receiving it, to the board of directors of such bank, at the next meeting of such board, and entered on the minutes, and written acknowledgment thereof made to the Superintendent of Banks.

This follows closely § 132 of the New York act.

§ 47. SEC. 3. Removal of Officer or Employee.

The Superintendent of Banks shall have the right to require the immediate removal from office of any officer or employee of any bank who shall be found by him to be dishonest, incompetent or reckless in the management of the affairs of the bank, or who per-

sistently violates the laws of the State or the lawful orders of the Superintendent.

This is a new section, giving the Superintendent a valuable right.

ARTICLE VI.

Impairment of Capital.

§ 48. SECTION 1. Transfer of Surplus.

Whenever the Superintendent of Banks shall find that the capital stock of any bank has become impaired or reduced as much as ten per cent. of its par value from losses or any other causes, the Superintendent of Banks shall notify and require such bank to make good its capital stock so impaired or reduced, by a transfer, from the surplus or undivided profits thereof to the capital stock, of a sum sufficient to make good such impairment or reduction, and upon receipt of such notice such bank so notified shall immediately make the transfer so required, by proper corporate action and proper entries upon its books.

By Code, § 2278, it was provided "whenever by reason of losses a bank's capital stock is impaired, the shrinkage in the capital represented by such losses shall be charged on the books of the bank to profit and loss," and by Code, § 2291, that whenever the capital should be impaired over ten per cent. the State Bank Examiner should notify the bank to make good the impairment within ninety days. This section is intended to provide against a bank with an impaired capital continuing to claim a surplus or undivided profits, the section requiring a proper adjustment of the accounts upon the books of the bank. A similar requirement is made by § 56 of the New York act.

§ 49. SEC. 2. Assessment of Stockholders.

If the surplus and undivided profits of such bank are insufficient to make good such impairment, the Superintendent of Banks shall notify such bank to make good the impairment within sixty (60) days, by an assessment upon the stockholders thereof, and it shall be the duty of the officers and directors of the bank receiving such notice to immediately call a special meeting of the stockholders for the purpose of making an assessment upon its stockholders sufficient to cover the impairment of the capital, payable in cash, at which meeting such assessment shall be made. *Provided*, That such bank may reduce its capital to the extent of the impairment

if such reduction will not place its capital below the amount required by this act.

This section substantially reenacts Code, § 2291, reducing the time within which the impairment shall be made good from ninety to sixty days. The original section followed the National Bank Act, § 5205, U. S. R. S.; § 9767, U. S. Comp. Stat.

§ 50. SEC. 3. Assessment, How Enforced.

If any stockholders should refuse or neglect to pay any assessment which may be levied by the special stockholders' meeting for the purpose of making good any impairment or reduction of capital, within thirty (30) days after such assessment shall have been levied, the directors of such bank shall have the right to sell to the highest bidder, at public outcry, for cash, a sufficient amount of the stock of such stockholder to cover the assessment after giving previous notice of such sale, once a week, for two (2) weeks, in the newspaper in which the sheriff's advertisements of the county in which the bank is located are published. But such stock shall in no event be sold for less than the amount of the assessment upon the same and the necessary costs of sale. Out of the proceeds of the sale of said stock, the directors shall pay the necessary costs of sale and the amount of the assessment called for thereon, and the balance, if any, shall be paid to the person or persons whose stock has been sold, or to the holder of the certificate therefor upon the surrender of such certificate. A sale of the stock as herein provided shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the same null and void, and the rights of any and all holders thereof shall terminate and a new certificate, or certificates, shall be issued to the purchaser or purchasers of such stock, free from all liens or claims whatsoever. The bank shall also have the right to sue a stockholder failing to pay any assessment so levied.

When any stockholder shall have pledged or hypothecated any of his stock and shall not pay any assessment levied on the stock so pledged, for any reason, it shall be his duty to give to the pledgee notice, by registered mail at least five (5) days before the expiration of the time within which such assessment may be paid, of the levy of such assessment and the amount thereof, and of the fact that he does not expect or intend to pay the same, giving to the pledgee the privilege of paying the amount of the assessment should he desire to do so for his own protection.

No means was provided under the old law for the enforcement of an assessment against a stockholder, but it was held that suit could be brought for the recovery of the amount of such assessment. *Commercial Bank of Athens v. Blassingame*, 147 Ga. 636. This section provides an additional remedy by the sale of the stock, following § 5205, U. S. R. S., as amended by the Act of June 30, 1876; § 9767, U. S. Comp. Stat.

ARTICLE VII.

Taking Possession of Bank by Superintendent.

§ 51. SECTION 1. Possession May Be Taken, When,

Whenever it shall appear to the Superintendent of Banks that any bank has violated its charter or any law of the State, or any law or regulation of the Department of Banking, or is conducting business in an unsafe or unauthorized manner; or that its capital is impaired more than ten per cent. below its par value and has not been made good under the requirement of the Superintendent; or when any bank shall refuse to submit its papers, books, and concerns to the inspection of the Superintendent, or any Examiner; or when any officer thereof shall refuse to be examined on oath touching the affairs, business, or concerns of any bank; or when any bank shall suspend payment of its obligations or shall fail to pay any final judgment from which no further appellate proceedings will lie within ten (10) days after the rendition thereof; or any other judgment within ten days after the expiration of the time for entering appellate proceedings; or when from any examination made by the Superintendent, or any Examiner, the Superintendent shall have reason to conclude that any bank is in an unsafe or unsound condition to transact the business for which it was organized, or that it is unsafe for it to continue business; or when any bank shall neglect or refuse to observe any lawful order of the Superintendent directing or requiring the doing of any particular matter or thing required to be done by law, the Superintendent himself, or by a duly authorized agent, shall forthwith take possession of all the assets and business of such bank and retain possession thereof until such bank shall be authorized by him to resume business, or its affairs be liquidated as herein provided.

Under the Bank Bureau Act the State Bank Examiner had no authority of his own motion to take charge of a bank, but was required when his examination disclosed that a bank was insolvent

to report the condition to the Governor, and when ordered by the Governor, to take charge. His possession was temporary until an examination of the affairs could be concluded, when if the fact of insolvency was established, the Governor was required to instruct the Attorney-General to institute proceedings for the appointment of a receiver. Code, §§ 2305, 2306. The State Bank Examiner was also authorized, where any officer of a bank refused to submit its books, papers, or assets to an Examiner or obstructed or interfered with him in the discharge of his duties or refused to be examined on oath touching the affairs of the bank, with the concurrence of the Governor and through the Attorney-General, to institute proceedings for the appointment of a receiver. Code, § 2292. And the State Bank Examiner was likewise authorized, where any bank refused or neglected to comply with any requirement lawfully made by him for a period of thirty days, to institute proceedings to forfeit the charter of such bank. Code, § 2347. This section follows the method outlined in the National Bank Act, §§ 5234, 5141, 5191, 5201, 5205, 5208, U. S. R. S., and the Act of June 30, 1876, as amended; §§ 9821, 9678, 9746, 9762, 9767, 9770, U. S. Comp. Stat. The Comptroller of the Currency, under these sections is authorized to appoint a receiver for a national bank, such receiver under the direction of the Comptroller being authorized to wind up the affairs of the bank. The Superintendent of Banks of New York, under § 57 of that law, is likewise authorized under circumstances similar to those given in this section to take charge of and administer the affairs of an insolvent bank. Under § 10 of the Alabama law, the Superintendent, with the concurrence of the Banking Board provided for by that act, has the authority to take charge of and administer an insolvent bank. The liquidation of such bank and the authority of the Superintendent in possession, as set forth in the following sections of this Article, is a combination of the powers of similar officers under the National Bank Act and the New York and Alabama statutes.

§ 52. SEC. 2. Directors May Surrender Possession.

Any bank may place its assets and business under the control of the Superintendent of Banks by posting a notice on the front door of such bank indicating that the bank is in the hands of the Superintendent of Banks, which notice shall be signed in their own handwriting by a majority of the directors of such bank.

This is substantially a reenactment of part of Code, § 2290.

§ 53. SEC. 3. Effect of Notice or Possession.

The posting of such notice by the directors, or the taking possession of any bank by the Superintendent of Banks, shall be sufficient to place all assets and property of such bank, of whatever nature, in possession of the Superintendent of Banks, and shall operate as a bar to any attachment or any other legal proceedings against such bank or its assets; and no lien shall be acquired in any manner binding or affecting any of the assets of such bank after the posting of such notice or taking possession of any bank by the

Superintendent, and every transfer or assignment by such bank or its authority, of the whole or any part of its assets, after the posting of such notice or the taking possession of such bank, shall be null and void.

A part of this section is also found in Code, § 2290. That section, however, only provided that the possession of the State Bank Examiner should operate as a bar to attachment proceedings, while this section avoids transfers and assignments as well as attachment proceedings after such taking possession.

§ 54. SEC. 4. No Assignment for Creditors Permitted.

No bank shall be authorized or permitted to make any general assignment for the benefit of its creditors, save and except by surrendering possession of its assets to the Superintendent of Banks as herein provided.

This section repeals Code, § 2358, which permitted a bank on surrendering its charter or its use thereof to make an assignment for the benefit of creditors.

§ 55. SEC. 5. Notice of Taking Possession.

On taking possession of the assets and business of any bank, as in this act authorized, the Superintendent of Banks shall forthwith give notice of such action to all banks and other persons or corporations holding or in possession of any assets of such bank. No bank or other person or corporation shall have a lien or charge for any payment, advance, or clearance thereafter made, or liability thereafter incurred, against any of the assets of the bank, of whose assets and business the Superintendent shall have taken possession as aforesaid.

This is taken substantially from § 65 of the New York law. The Alabama act, § 10, contains a similar provision in practically the same language. The National Bank Act, § 5235, U. S. R. S.; § 9822, U. S. Comp. Stat., also provides for notice to be given to creditors.

§ 56. SEC. 6. Business Resumed, How.

After the Superintendent of Banks has so taken possession of any bank, the Superintendent may permit such bank to resume business upon such conditions as may be approved by him.

This section is taken substantially from § 61 of the New York act, and is quite similar to § 10 of the Alabama act.

§ 57. SEC. 7. Collections and Sales, How Made.

Upon taking possession of the assets and business of any bank, the Superintendent is authorized to collect all moneys due to such bank, and to do such other acts as are necessary to conserve its assets and business, and shall proceed to liquidate the affairs thereof, as hereinafter provided. The Superintendent shall collect all debts due and claims belonging to such bank, and by making application to the Superior Court of the county in which such bank is located, or to the judge thereof, if said Superior Court be not then in session, may procure an order to sell, compromise or compound any bad or doubtful debt or claim, and on like order the Superintendent may sell the real and personal property of such bank on such terms as the court, or the judge thereof, shall direct, but on any such court proceedings the bank shall be made a party by a proper notice issued from the court, and the hearing of any such application or petition by the Superintendent may be had at any time, either in term or vacation, after the bank has had five (5) days' notice of such application.

This section follows § 69 of the New York act. Somewhat similar duties were prescribed for the receiver of a bank by Code, § 2351. The National Bank Act, as amended by the Act of March 29, 1886, § 9828 U. S. Comp. Stat., authorized a receiver of a national bank to purchase property in order to protect his trust. This section, which gives to the Superintendent when in charge of a bank authority to do all acts necessary to conserve its assets and business, is broad enough to give the Superintendent the right to purchase property where necessary in order to so "conserve the assets."

§ 58. SEC. 8. Superintendent, How Enjoined.

Whenever any bank of whose assets and business the Superintendent has taken possession, as aforesaid, shall deem itself aggrieved thereby, it may at any time within ten (10) days after its assets and business shall have been taken possession of, apply to the Superior Court of the county in which its office shall be located, or to the judge of such court, if the court be not then in session, to enjoin further proceedings by the Superintendent to show cause why further proceedings should not be enjoined, and after hearing the allegations and proof of the parties and determining the facts, may dismiss such application or enjoin the Superintendent from further proceeding and direct the said Superintendent to surrender such business and assets to said bank. Such application for injunction may be heard at any time after three (3) days' notice from the time of service on the Superintendent, in the

discretion of the court, with the right to either party by bill of exception, as in other cases of applications for temporary injunction, to carry said case to the Supreme Court for review.

This is taken substantially from § 10 of the Alabama law. A similar provision for enjoining the Comptroller of the Currency by a national bank is made by § 5237, U. S. R. S.; § 9824, U. S. Comp. Stat. Construing a similar section (§ 60) of the New York statute, it was held: The power of the Supreme Court to review the action of the Superintendent is limited to ascertaining whether or not there has been an abuse of discretion. If the court finds that the Superintendent's action was justified, it can not direct him to restore possession upon compliance by the delinquent with certain conditions specified in the order. *Matter of Lunghino & Sons*, 176 App. Div. (N. Y.) 285.

§ 59. SEC. 9. Superintendent May Appoint Agent.

The Superintendent may, under his hand and official seal, appoint an agent to assist him in taking possession of, liquidating and distributing the assets of any bank under the provisions hereof, the certificate of appointment to be filed in the office of the Superintendent, and a certified copy thereof delivered to such agent. Such agent shall receive a salary, to be fixed as hereinafter provided for the time he is actually engaged in assisting in liquidating the affairs of the bank. The Superintendent may authorize such agent to perform such duties connected with such liquidation and distribution as the Superintendent himself could in person do and perform.

This follows § 10 of the Alabama act. A similar provision is made by § 62 of the New York act, and by § 5234, U. S. R. S.; § 9821, U. S. Comp. Stat.

§ 60. SEC. 10. Attorneys, Accountants, and Assistants.

The Superintendent may employ such attorneys and procure such expert accountants and other experts, assistants and employees as may be necessary in the liquidation and distribution of the assets of such bank, and may retain such of the officers or employees of such bank as he may deem necessary.

Similar provisions are made by § 10 of the Alabama act and § 62 of the New York act.

§ 61. SEC. 11. Bonds of Agent and Other Assistants.

The Superintendent shall require from the agent appointed by him, and from such of the assistants as will have charge of any

of the assets of the bank, such security for the faithful discharge of their duties as he may deem proper.

A similar provision is made by § 10 of the Alabama act, § 62 New York law, and § 5234, U. S. R. S.; § 9821, U. S. Comp. Stat.

§ 62. SEC. 12. Inventory to Be Filed.

Upon taking possession of the assets and business of any bank, the Superintendent shall make an inventory of the assets thereof in triplicate, one copy to be filed in the office of the Superintendent and one copy to be filed, but not recorded, in the office of the clerk of the Superior Court of the county in which the bank is located, and one copy to be kept on file in the bank. Such inventories shall be open to inspection during regular office hours of such offices, respectively.

This is taken substantially from § 66 of the New York law and a similar provision is made in § 10 of the Alabama law.

§ 63. SEC. 13. Notice to Creditors and Proof of Claims.

The Superintendent shall cause notice to be given by advertisement in the newspaper in which the sheriff's advertisements of the county in which the bank is located are published, and in any other newspaper which in the opinion of the Superintendent may be necessary or advisable, once a week for four weeks, calling on all persons who may have claims against the bank to present the same to the Superintendent and make sworn proof thereof, filing the same with said Superintendent at the office of the bank, and within any time to be specified in the notice, not less than ninety (90) days from the date of the first publication of the notice. A copy of this notice shall be mailed to all persons whose names appear as creditors upon the books of the bank.

Similar provisions are made by § 10 of the Alabama law, § 72 of the New York law, and § 5235, U. S. R. S.; § 9822, U. S. Comp. Stat.

§ 64. SEC. 14. Pass Books Called In.

The Superintendent shall also in like manner notify all depositors to bring in their pass books to be balanced and compared with the books of the bank. Deposits appearing on the books of the bank which agree with deposits as shown by the pass books shall be held to be *prima facie* proven claims against the bank.

The Alabama act, § 10, provides that deposits shown on the books of the bank are *prima facie* proven claims against the bank. This section goes further, requiring the calling in of pass books for balancing and comparison.

§ 65. SEC. 15. Superintendent May Reject Claims.

If the Superintendent doubts the justice and validity of any claim or deposit, he may reject the same, and serve notice of such rejection upon the claimant or depositor, either personally or by registered mail, and an affidavit of the service of such notice, which shall be *prima facie* evidence thereof, shall be filed in the office of the Superintendent. Any action or suit upon such claim so rejected must be brought by the claimant against the bank in the proper court of the county in which the bank is located within ninety (90) days after such service, or the same shall be barred.

Similar provisions are made by § 10 of the Alabama law and § 75 of the New York law.

§ 66. SEC. 16. Objections to Claims.

Objections to any claim or deposit not rejected by the Superintendent may be made by any party interested by filing a copy of such objections with the Superintendent, and the Superintendent, after investigation, shall either allow such objections and reject the claim or deposit, or present such objections to the Superior Court of the county in which the bank is located, which court shall cause an issue to be made up and tried at the first term thereafter as to whether or not such claim or deposit should be allowed.

This follows substantially § 10 of the Alabama law and § 74 of the New York law.

§ 67. SEC. 17. List of Claims Made Up and Filed.

Upon the expiration of the time fixed for the presentation of claims, the Superintendent shall make in triplicate a full and complete list of the claims presented and of the deposits as shown by the books of the bank, including and specifying any claims or deposits which have been rejected by him, one copy to be filed in the office of the Superintendent and one copy to be filed, but not recorded, in the office of the clerk of the Superior Court of the county in which the bank is located, and one copy to be kept of file in the bank. Such inventories and list of claims shall be open to inspection during the regular office hours of such offices, respectively.

This section follows substantially § 10 of the Alabama Law and § 73 of the New York law.

§ 68. SEC. 18. CLAIMS PRESENTED AFTER TIME FIXED.

Claims presented to the Superintendent after the expiration of the time fixed in the notice to creditors, as herein provided, shall be entitled after they have been allowed by the Superintendent to share in the distribution of the assets of the bank only to the extent of the assets undistributed and in the hands of the Superintendent at the time such claims are filed.

This follows § 10 of the Alabama law. Under the New York law, § 72, the Superintendent has no power to accept a claim presented after the time fixed in the notice has expired.

§ 69. SEC. 19. ORDER OF PAYING DEBTS.

The order of paying off the debts of an insolvent bank shall be as follows:

1. Debts due the State of Georgia.
2. Debts due any county, district or municipality of the State, including unpaid taxes.
3. Debts due the United States.
4. The expenses of liquidation, including the compensation of agents and attorneys.
5. Debts due by the bank as trustee or other fiduciary and other claims of like character.
6. Judgments and debts secured by lien to the extent of the value of such lien, not void or voidable under the provisions of this act or the law of Georgia; judgment and lien to have the force, rank and dignity prescribed by law.
7. Debts due to depositors and other contractual liabilities *pro rata*.
8. Unliquidated claims for damages and the like.

Under the Act of 1842, Cobb's Digest 119, it was provided that "where the charter of a bank is forfeited and the bank is insolvent, the order of paying the debts shall be the same as prescribed in cases of administration to the extent applicable, except where special preference or postponement is given by law." This act continued until the present law went into effect as the only rule for the distribution of the assets of an insolvent bank, having been reenacted in the Bank Bureau Act, Code, § 2353. The rule prescribed for the distribution in cases of administration was manifestly inappropriate where the assets of an insolvent bank were to be distributed, and the present section was framed with a view to making a more equitable distribution.

Under the old law it was held that the State was entitled to priority of payment where both State and individuals were creditors of

insolvent bank. *Seay v. Bank of Rome*, 66 Ga. 609 (4); see also 18/65 (7-9), 95; 131/750 (2), (63 S. E. 502); 134/163 (1), (67 S. E. 803); 139/54 (2) (76 S. E. 587). But county was not so entitled to priority. *County of Glynn v. Brunswick T. Co.*, 101 Ga. 244; (28 S. E. 604).

§ 70. SEC. 20. ASSESSMENT OF STOCKHOLDERS.

Within ninety (90) days after the Superintendent of Banks has taken possession of the assets and business of any bank, as in this act authorized, he shall make a careful estimate of the value of the cash assets of said bank which can probably be converted into cash within one year after so taking possession of the assets and business of said bank, and of the amount of such cash assets which will be available to pay depositors; and he shall immediately thereupon make an assessment upon the stockholders of said bank sufficient, when added to the cash assets so available for depositors, to pay the said depositors in full; provided that such assessment shall not exceed the liability of stockholders upon their said stock. Notice of such assessment shall be given by mail to each of the stockholders of said bank, and if any stockholder so notified shall refuse or neglect to pay any such assessment within thirty (30) days after the levy of such assessment and notice thereof, the Superintendent of Banks shall issue an execution against such stockholder for the amount of such assessment, which shall be enforced in like manner as executions issued by the Superior Courts of this State upon judgments regularly rendered by said courts; provided, however, that any stockholder shall have the right by affidavit of illegality, as in cases of affidavits of illegality to other executions, to contest his liability for such assessment, but not the correctness of the estimate made by such Superintendent or the amount of such assessment, which estimate and the amount of such assessment shall be final and conclusive upon the stockholders. If at any time prior to the final payment of all the indebtedness of such bank, it shall appear to the Superintendent that the assessment made by him is insufficient in amount to pay such depositors in full, said Superintendent may from time to time make other assessments not in excess of the liability of the stockholders upon their stock which shall be enforced and collected in like manner.

After all the indebtedness of such bank is paid in full, the remaining assets of such bank shall be applied first to reimbursing the stockholders who have paid such assessment or assessments, and thereafter *pro rata* to all the stockholders.

Under Code, § 2356, where the assets of the bank were insufficient to pay all of its liabilities, the receiver was authorized to bring suit against the stockholders for the recovery from each of his appropriate share thereof, and it was further provided that on failure or neglect of the receiver to do so any creditor might institute such suit in the receiver's name. This section authorizing the Superintendent to assess the stockholders follows § 5234, U. S. R. S.; § 9821, U. S. Comp. Stat., and is a distinct improvement on the former method. The Comptroller of the Currency can only enforce his assessment by suit. He can not issue an execution as the Superintendent is authorized to do by this section. The New York statute, § 80, is quite similar to § 5234, U. S. R. S.; § 9821, U. S. Comp. Stat.

§ 71. SEC. 21. Dividends, When Paid.

At any time after the expiration of the date fixed by the Superintendent for the presentation of claims against the bank, and from time to time thereafter, the Superintendent may, out of the funds remaining in his hands after the payment of expenses and priorities, declare and pay dividends to the depositors and other creditors of such bank, and a dividend shall be declared when and as often as the funds on hand subject to the payment of dividends shall be sufficient to pay ten (10) per cent. of all claims entitled to share in such dividends.

In calculating dividends, all disputed claims and deposits shall be taken into account, and the amount of dividends upon such disputed claims or deposits shall be held by the Superintendent until the justice and validity of such claims or deposits shall have been finally determined.

This section follows § 10 of the Alabama law, § 78 of the New York law. A similar provision is made by § 5236, U. S. R. S.; § 9823, U. S. Comp. Stat.

§ 72. SEC. 22. Funds to Be Deposited.

All funds collected by the Superintendent shall be from time to time deposited in such bank or banks as may be selected by him, subject to the check of the Superintendent of Banks.

This section follows § 10 of the Alabama law and § 70 of the New York law. Formerly the Comptroller was required to deposit all funds of insolvent national banks in his hands in the United States Treasury, but by an amendment to § 5234, U. S. R. S., approved May 15, 1916, § 9821, U. S. Comp. Stat., he was authorized to deposit such funds in any regular Government depository or any national or state bank in the city in which the bank was located or in a city as adjacent thereto as practicable.

§ 73. SEC. 23. Compensation of Agents, Attorneys, and Others, How Fixed.

The compensation of the agents appointed by the Superintendent and of attorneys, expert accountants, and other assistants, and all expenses of liquidation and distribution of a bank whose assets and business shall be taken possession of by the Superintendent, shall be fixed by the Superintendent, but subject to be approved by the judge of the Superior Court of the county in which the bank is located, on notice to such bank. Except in cases of emergency, the compensation to be paid to attorneys and expert accountants shall be fixed and approved before services are rendered. When the compensation shall have been so fixed and approved and the services rendered, the same shall be paid out of the funds of such bank in the hands of the Superintendent, and shall be a proper charge and lien on the assets of such bank.

This section follows § 10 of the Alabama law and § 63 of the New York law. Section 5238, U. S. R. S.; § 9825, U. S. Comp. Stat., also provides that the expense of receivership shall be paid out of the assets before distribution thereof.

§ 74. SEC. 24. Unclaimed Dividends and Deposits.

Dividends and unclaimed deposits remaining unpaid in the hands of the Superintendent for six (6) months after the order for final distribution, shall be by him deposited in a bank, to be selected by him, at the best rate of interest obtainable, to the credit of the Superintendent and his successors in office, in trust for the several depositors in, and creditors of, the liquidated bank and the Superintendent may pay over the money so held by him to the persons, respectively, entitled thereto, as and when satisfactory evidence of their right to the same is furnished. In case of doubtful or conflicting claims, the Superintendent may require an order from the Superior Court of the county in which the bank is located authorizing and directing the payment thereof. The interest earned on the moneys so held by him shall be applied toward defraying the expenses incurred in the payment and distribution of such unclaimed deposits or dividends to the depositors and creditors entitled to receive the same. The balance of interest, if any, shall be deposited and held as other funds to the credit of the Department of Banking.

This section follows § 10 of the Alabama law.

§ 75. SEC. 25. Stockholders' Meeting to Be Called.

Whenever the Superintendent shall have paid to each and every depositor and creditor of such bank whose claim shall have been duly proven and allowed, the full amount of such claim, and shall have made proper provision for unclaimed and unpaid deposits and disputed claims and deposits, and shall have paid all the expenses of liquidation, the Superintendent shall call a meeting of the stockholders of such bank by giving notice thereof by publication once a week for four weeks in the newspaper in which the sheriff's advertisements of the county in which the bank is located are published, and by mailing a copy of such notice to each stockholder addressed to him at his address as the same shall appear upon the books of the bank; and at such meeting the stockholders shall determine whether the Superintendent shall continue as liquidator and shall wind up the affairs of such bank, or whether an agent or agents shall be elected for that purpose, and in so determining, the stockholders shall vote by ballot in person or by duly executed proxy, each share of stock entitling the holder to one vote, and a majority vote of the stock shall be necessary to a determination. In case it is determined to continue the liquidation under the Superintendent, he shall complete the liquidation of the affairs of such bank, and, after paying the expenses thereof, and reimbursing the stockholders who have paid any assessments upon their stock the amounts paid by them, respectively, he shall distribute the proceeds among the stockholders in proportion to their several holdings of stock.

This section follows § 10 of the Alabama law and § 79 of the New York law, both of which follow the Act of Congress of June 30, 1876, as amended, making similar provision in cases of national banks. § 9827 U. S. Comp. Stat.

§ 76. SEC. 26. Stockholders' Agent, Election, Powers, and Duties of.

In case it is determined to appoint an agent or agents to liquidate, the stockholders shall thereupon elect such agent or agents by ballot, each share being entitled to one vote, the majority of the stock present and voting being necessary to a choice. Such agent or agents shall execute and file with the Superintendent a bond in such amount, with such security and in such form as shall be approved by the Superintendent conditioned for the faithful performance of all the duties of his or

their trust, so conditioned that any party aggrieved may bring or cause to be brought suits on said bond, and thereupon the Superintendent shall transfer and deliver to such agent or agents all the undivided and uncollected or other assets of said bank then remaining in his hands, and upon such transfer and delivery the said Superintendent shall be discharged from any and all further liability to such bank and its creditors. Such agent or agents shall convert the assets coming into his or their hands into cash, and shall act for and make distribution of the property of said bank, as is herein provided in case of distribution by the Superintendent, the expenses of such liquidation being subject to the control and approval of the judge of the Superior Court of the county in which the bank is located.

This section follows § 10 of the Alabama law and § 79 of the New York law, both of which follow the Act of Congress of June 30, 1876, as amended, making similar provision in cases of national banks. § 9827 U. S. Comp. Stat.

§ 77. SEC. 27. Successor of Agent, How Chosen.

In case of the death, removal, or refusal to act of any agent or agents elected by the stockholders, the stockholders, upon notice given by the Superintendent, as is herein provided in case of the original election upon proof of such death, removal, or refusal to act being filed with said Superintendent, and by the same vote as hereinbefore provided for, shall elect a successor, who shall have the same powers and be subject to the same liabilities and duties as the agent or agents originally elected.

This section follows § 10 of the Alabama law, which follows the Act of Congress of June 30, 1876, as amended, making similar provision in case of a national bank. § 9827 U. S. Comp. Stat.

§ 78. SEC. 28. Superintendent to Report Banks Liquidated.

The Superintendent shall file as a part of his annual report to the Governor a list of the names of the banks so taken possession of and liquidated, and the sum of unclaimed and unpaid deposits or dividends with respect to each of them respectively, and where such unpaid depositors or dividends are deposited.

This section follows § 10 of the Alabama law and § 83 of the New York law.

ARTICLE VIII.

Incorporation of Banks.

§ 79. SECTION 1. Application for Charter.

Any number of persons not less than five (5) may form a corporation for the purpose of carrying on the business of banking, by filing in the office of the Secretary of State an application in writing signed by each of them, in which they shall state:

1. The name by which such bank is to be known.
2. The particular city, town, or village, where its office is to be located.
3. The amount of its capital stock which shall not be less than fifteen thousand dollars (\$15,000.00) in any town or village incorporated or unincorporated, whose population does not exceed one thousand (1,000) according to the last preceding census of the United States, and not less than twenty-five thousand dollars (\$25,000.00) in any city, town, or village whose population exceeds one thousand (1,000) and is less than ten thousand (10,000), and not less than fifty thousand dollars (\$50,000.00) in any city or town whose population exceeds ten thousand (10,000).
4. The number of shares into which such capital stock shall be divided, provided the par value of each share of stock shall be one hundred dollars (\$100.00).
5. The purposes and nature of the business proposed to be conducted, with any other matters which they may deem it desirable to state.

6. The number of directors of the bank, which shall not be less than three (3) nor more than twenty-five (25).

Said application shall be filed in triplicate, and a fee of fifty dollars (\$50.00) shall be paid to the Secretary of State to be covered by him into the Treasury of the State, on filing the application, and the Secretary of State shall not receive said application until said fee shall be paid.

[The persons filing such application may also acquire all the rights, powers, privileges and immunities and be subject to all the liabilities and restrictions conferred and imposed upon trust companies of Sections 2815 to 2821, both inclusive, of the Civil Code of Georgia of 1910 and the several Acts amendatory thereof, and in addition to the usual banking powers, as conferred and de-

scribed in this Act, providing such applicants shall allege that at least \$100,000.00 of capital stock has been subscribed and actually paid in; provided also such applicants shall pay to the Secretary of State upon filing such application to be covered by him into the Treasury of the State, a fee of \$25.00 in addition to the fee of \$50.00 above provided, in all cases where trust company powers are desired as above set forth.]*

Under the amendment to Article III, § 7, Paragraph 18, of the Constitution ratified in 1892 (Code, § 6446), "all corporate powers to banking companies are required to be issued and granted by the Secretary of State in such manner as shall be prescribed by law, and if in the event the Secretary of State shall be disqualified, then the Legislature shall prescribe by general laws by what person such charter shall be granted." Anticipating the ratification of this amendment, a general law for the incorporation of banks by the Secretary of State was adopted in 1891 (Acts 1890-91, p. 59). This was superseded by the Act of 1893 (Code, §§ 2266 *et seq.*), which act remained in force until the present law.

The legislature provided, Code, § 2263, that "in case the Secretary of State is disqualified to act in any case, the application shall be filed with the Comptroller General, who shall perform all the duties prescribed for the Secretary of State."

Under the Act of 1893 any number of persons, not less than three, might form a banking corporation. Code, § 2262. The minimum capital was fixed at \$25,000.00, not less than \$15,000.00 of which was required to be paid in in cash at the time the application for charter was filed. Code, § 2269. The provision for graduating the amount of capital in accordance with the population of the town or city in which the bank is located is similar to the requirement of § 5138, U. S. R. S., as amended by the Act of March 14, 1900, U. S. Comp. Stat., § 9675. Alabama also graduates the required capital stock by the number of inhabitants of the city or town in which the bank is to be located. § 18. This section, with the exceptions mentioned, follows Code, § 2262, though the information required to be furnished is somewhat fuller.

§ 80. SEC. 2. Application to Be Published.

When the application is filed, the Secretary of State shall certify one of the copies thereof and deliver the same to the applicants, and the same shall be published by the applicants in the newspaper in which the sheriff's advertisements of the county, in which the bank is to be located, are published, once a week for four weeks.

This section is substantially a reenactment of Code, § 2264.

§ 81. SEC. 3. Application Referred to Superintendent of Banks.

Immediately upon the filing of the application, the Secretary of State shall transmit one copy thereof to the Superintendent of Banks for investigation by him.

*Added by Act of August 14, 1920.

Under the Act of 1893, no investigation of the application for charter was required, no information had to be furnished other than that contained in the petition and the certificate of its publication, and the Secretary of State acted in a purely ministerial capacity in issuing the charter. The requirement for investigation by the Superintendent provided for in this and the following section is intended to insure the full compliance with the statutory requirements as to the payment of capital, etc., and is a proper safeguard thrown around the incorporation.

§ 82. SEC. 4. Information to Be Furnished Superintendent by Applicants.

When such application has been referred to the Superintendent of Banks he shall call upon the applicants for a statement, showing:

1. The names and places of residence of the subscribers to the stock of such bank and the number of shares to be held by each.
2. The names of the stockholders who shall be directors for the first year of the incorporation of said bank.
3. How and when it is proposed that the capital stock shall be paid in.
4. When it is proposed that such bank shall commence business.
5. Such other information as may be desired by the Superintendent of Banks.

Which statement it shall be the duty of said applicants to furnish upon request of said Superintendent.

§ 83. SEC. 5. Certificate of Publication.

When said application shall have been published, the applicants may apply to the ordinary of the county in which the proposed bank shall be located to certify the fact of such publication, and the ordinary shall certify the fact, which certificate shall be filed by the applicants in the office of the Secretary of State.

This section is substantially a re-enactment of Code, § 2265.

§ 84. SEC. 6. Certificate of Incorporation to Be Issued.

When the certificate of the ordinary to the fact of the publication of the application shall have been filed by the applicants in the office of the Secretary of State, the Secretary of State shall issue to the applicants, their associates, and successors, a certificate of incorporation under the seal of the State, certifying that the applicants, their associates, and successors, are a body

politic and corporate under the name and style designated in the application, and that such corporation has the capacity and powers conferred, and is subject to all the duties and liabilities imposed by law; and the Secretary of State shall record the application, the certificate of approval of the Superintendent of Banks, the certificate of the ordinary as to publication, and the certificate of incorporation, in the order named.

This section is also substantially a reenactment of a portion of Code, § 2265.

§ 85. SEC. 7. Payment of Capital.

At least sixty per cent. (60) per share of the capital stock of every bank, and in no event less than fifteen thousand dollars (\$15,000.00), shall be paid in, in cash, before such bank shall be authorized to commence business, and the remainder of the capital stock shall be paid in within one year, in such installments as may be approved by the Superintendent of Banks, and the payment of each installment shall be certified to the Superintendent of Banks under oath by the president or cashier of the bank.

Code, § 2269, provided that not less than twenty per cent. of the required capital must be paid in before filing the application with the Secretary of State, and in no event less than \$15,000.00. This section changes the requirement so as to provide that at least sixty per cent. per share must be paid in, and in no event less than \$15,000.00, and adds that the remainder of the capital shall be paid in within one year. Under the former law, banks were incorporated with a minimum capital of \$25,000.00, but with only \$15,000.00 paid in, and there was no requirement for the payment of the balance within any specified time. Many banks have continued to do business with only \$15,000.00 paid in for a number of years. The requirement as to the payment of the capital in installments and the certification of each installment to the Superintendent of Banks is quite similar to that of § 5140, U. S. R. S.; § 9677, U. S. Comp. Stat.

§ 86. SEC. 8. Permit to Begin Business.

Before any bank shall transact any business as a bank, such bank shall file with the Superintendent of Banks a request for a permit to commence business. No bank shall transact any business as a bank without the written permit of the Superintendent, certifying that such bank has complied with all the requirements of law, and is authorized to transact business as a bank, and that such business can be safely entrusted to it which permit shall be recorded in the office of the Superintendent in a book to be kept by him for that purpose; and a certified copy thereof under the hand

and official seal of the Superintendent shall be furnished to and kept of file by the bank. The Superintendent, before issuing his permit to any bank to begin business, shall make an examination, or cause an examination to be made, in order to ascertain whether the requisite capital of such bank shall have been paid in, in cash. The Superintendent shall not authorize any bank to commence business until it shall be made to appear to his satisfaction, from such examination, that the amount of capital herein required has been subscribed in good faith, and that at least sixty per cent. (60) per share of the authorized capital stock, and in no event less than fifteen thousand dollars (\$15,000.00), has been paid in, in cash, and that provision has been made for collecting the remaining portion of the capital within one (1) year. The first directors shall be those named in the application for charter or such stockholders as may be substituted, with the approval of the superintendent, for any therein named.

No permit to begin business was required under the old law. The incorporators on obtaining a charter from the Secretary of State could begin business immediately without any further requirement. This provision for investigation by the Superintendent to ascertain whether the capital has been paid in and the other requirements of the statute complied with is taken in substance from the National Bank Act, §§ 5168, 5169, U. S. R. S.; §§ 9710, 9711, U. S. Comp. Stat. Similar requirements are provided under the New York act, § 24, and the Alabama act, § 27.

§ 87. SEC. 9. Enforcing Payment of Capital.

Whenever any stockholder, or his assignee, shall fail to pay any installment on the stock when the same is required to be paid, the directors of such bank may sell the stock of such delinquent stockholder at public sale, after giving four (4) weeks' previous notice thereof in the newspaper in which the sheriff's advertisements are published, in the county in which the bank is located, said sale to be to the highest bidder for cash, provided such bid shall not be less than the amount unpaid on such stock, with the expense of advertisement and sale, and out of the proceeds the bank shall pay the expenses of sale and the balance due on the stock, and the excess, if any, shall be paid to the delinquent stockholder. If no bidder can be found who will pay for such stock the amount due thereon to the bank, together with the costs of advertisement and sale, the amount previously paid by the stockholder shall be forfeited to the bank, and such stock shall be sold by the directors either at public or private sale, as they shall see fit, within six (6) months from the time of such

forfeiture, and if not sold, it shall be cancelled and deducted from the capital stock of the bank. If any such cancellation or reduction shall reduce the capital stock of the bank below the minimum capital required by law for such bank, the capital shall within thirty (30) days from the date of such cancellation be increased to the required amount, in default of which the Superintendent of Banks shall be authorized to proceed as in cases where the capital stock shall have become impaired by reason of losses or otherwise.

A sale of stock as herein provided shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold and shall make the same null and void, and the rights of any and all holders thereof shall terminate, and a new certificate or certificates shall be issued to the purchaser or purchasers of such stock, free from all liens and claims whatsoever.

The remedies of sale or forfeiture herein provided shall be cumulative to any other remedies provided by law for the collection of the unpaid balance of such subscription.

The Act of 1893 made no provision for the collection of installments on stock. Such collection could only be enforced by suit. The section follows the National Bank Act, § 5141, U. S. R. S.; § 9678, U. S. Comp. Stat.

§ 88. SEC. 10. **Lien on Stock for Unpaid Installment.**

Any bank, the stock of which has not been fully paid for by the subscriber or subscribers, shall have and is hereby given a special lien upon said stock, which lien shall not be divested by sale, transfer, or otherwise until all installments are fully paid thereon. Any certificate of stock issued before the stock shall have been paid for in full shall show upon the face thereof the amount which has been paid. Save and except for unpaid installments due thereon no bank shall have or enforce, by by-law or otherwise, any lien on its stock unless the same shall have been regularly pledged and the stock certificate transferred to the bank as in case of other collateral.

Code, § 3375, authorizes a corporation by its by-laws to create a lien upon its shares of stock in favor of the corporation. This section prohibits the creation of such a lien by a bank, the bank being given a lien by the act itself for unpaid installments of the capital stock only.

ARTICLE IX.

Amendment of Bank Charters.

§ 89. SECTION 1. What Amendments Allowed.

Any bank, whether incorporated by special act of the General Assembly or by the Secretary of State under the general law, may have its charter amended so as to change its corporate name; or the city, town, or village in which its office is located; or the amount of its capital stock; or the number of shares into which its capital stock is divided, so as to change the par value thereof to one hundred dollars each; [where the capital stock of such bank subscribed and paid in shall be not less than One Hundred Thousand (\$100,000.00) Dollars, so as to acquire all the rights, powers, privileges and immunities and be subject to all the liabilities and restrictions conferred and imposed upon trust companies by Sections 2815 to 2821, both inclusive, of the Civil Code of 1910, and the several Acts amendatory thereof ;]* and any bank heretofore incorporated by special act of the General Assembly may have its special charter amended so as to incorporate therein any provision of this act or any amendment thereto.

Under various acts of the Legislature, Code, §§ 2197, 2201, 2268, and 2271, four separate and distinct methods of amending bank charters were provided. Sometimes the same amendment could be obtained in either one of two ways, and sometimes where it was desired to obtain more than one amendment, the two amendments could only be obtained by different methods. This Article substitutes a simple uniform method for all amendments.

§ 90. SEC. 2. Application for Amendment.

The bank desiring such amendment shall file in the office of the Secretary of State an application in triplicate, signed with its corporate name and under its corporate seal, in which it shall state the name of said bank, the date of its original charter, and all amendments thereto, and the particular amendment or amendments to its said charter it desires; and shall pay to the Secretary of State a fee of twenty-five (\$25.00) dollars, to be covered by him into the Treasury of the State. Said bank shall also file

*The Secretary of State having refused to grant an amendment to a charter conferring trust company powers upon the ground that the Act of 1917 was repealed by the Banking Act of 1919, this provision was inserted by the Act of August 14, 1920.

with said application a certified abstract from the minutes of the stockholders thereof showing that the application for the proposed amendment has been authorized by a vote of a majority in amount of the entire capital stock at a meeting of the stockholders, called for the purpose of acting thereon, by a resolution of the board of directors, notice of which meeting shall have been mailed to each stockholder, or in case of death, to his legal representatives or heirs at law, addressed to his last known residence at least ten (10) days previous to the date of said meeting, provided, however, if the application is to change the city, town or village in which its office is located, then the certified abstract from the minutes shall show that the amendment was authorized by the unanimous vote of the stockholders present at said meeting.

The method here provided is substantially the same as in Code, § 2272.

§ 91. SEC. 3. Application to Be Published.

When the application is filed, the Secretary of State shall certify one of the copies thereof and deliver the same to the bank and the same shall be published by the bank in the newspaper in which the sheriff's advertisements of the county in which the bank is located, are published, once a week for four (4) weeks.

This substantially reenacts Code, § 2273.

§ 92. SEC. 4. Application Referred to Superintendent of Banks.

Immediately upon the filing of the application for amendment, the Secretary of State shall transmit one copy thereof to the Superintendent of Banks for investigation by him.

The requirements for referring the application to the Superintendent for investigation and the examination and certificate provided for in the succeeding section are new. Similar requirements are made where an amendment to the articles of association of a national bank is sought. Acts of July 12, 1882, and May 1, 1886. §§ 9662, 9679, 9680, 9681, U. S. Comp. Stat.

§ 93. SEC. 5. Examination by and Certificate of Superintendent.

When such application for amendment shall have been referred to the Superintendent of Banks, the said Superintendent shall immediately investigate either through himself or

some person appointed by him, and shall satisfy himself that such amendment is proper and has been duly authorized by proper corporate action, and in case said application is for the increase of the capital stock, that the amount of such additional capital has been paid in, in cash, except where surplus is capitalized, and in case said application is for the reduction of the capital stock, that the method by which such reduction is accomplished is proper and fair to all the stockholders and that the capital stock is not reduced below the amount required by law for such bank, and that all the requirements of law have been fulfilled. If so satisfied the Superintendent of Banks shall, within thirty (30) days after the application for amendment shall have been filed with him for examination, issue under his hand and official seal a certificate approving the amendment to the charter of such bank, and shall transmit a copy of such certificate to the Secretary of State, who shall enter the same of record in his office. The said Superintendent shall also keep of file a duplicate of said certificate in his own office. If the Superintendent shall not be satisfied that the amendment as proposed is expedient and desirable, or that the law for such cases made and provided has been fully complied with, or, if the said amendment is for the increase of the capital stock, that the said increase has not been paid in, as herein provided, he shall, within thirty (30) days after the filing of the copy of said application for amendment with him, notify the Secretary of State that he refuses to approve the amendment to the charter, and no amendment shall in that event be granted by the Secretary of State.

§ 94. SEC. 6. Certificate of Publication.

When the application to amend the charter shall have been published, the bank may apply to the ordinary of the county in which it is located to certify the fact of such publication, and the ordinary shall certify the fact, which certificate shall be filed by the bank in the office of the Secretary of State.

This section is substantially a reenactment of Code, § 2274.

§ 95. SEC. 7. Certificate of Amendment to Be Issued.

When the certificate of the ordinary to the fact of the publication of the application for amendment shall be filed by the bank in the office of the Secretary of State, and the certificate of the

Superintendent of Banks approving the application for amendment shall likewise be filed with the Secretary of State, the Secretary of State shall issue to the bank a certificate, under the seal of the State, amending the charter in the particulars prayed for; and the Secretary of State shall record the application for amendment, the certificate of approval of the Superintendent of Banks, the certificate of the ordinary as to the publication, and his certificate of amendment, in the order named.

A similar certificate was required under the several methods of amendment of bank charters under the former law. Code, §§ 2198, 2200, 2202, 2274.

§ 96. SEC. 8. Increase of Capital from Surplus and Undivided Profits.

Any bank may increase its capital stock from its surplus and undivided profits where its charter has been amended authorizing such increase and the approval of the Superintendent of Banks to such increase from the surplus and profits shall have been previously obtained, provided that no increase from surplus and profits shall be made which will reduce the unimpaired surplus to an amount less than twenty (20) per cent. of the capital stock.

This is an original section, its purpose while authorizing the transfer of surplus to capital account being to require the keeping intact of the required twenty per cent.

§ 97. SEC. 9. Increase Offered to Stockholders.

When the capital stock of any bank shall be increased, the additional stock shall be offered to the stockholders of record at the time of such increase *pro rata*, and if any such stock shall not be subscribed for or taken by such original stockholders, the same shall then be offered to the public upon such terms as may be fixed by the board of directors subject to the approval of the Superintendent of Banks, provided that no stock shall ever be sold for less than par and that no subscription shall be payable in anything except cash; [provided, however, that the payment of such increase of capital stock may be made in the manner set forth in Section 7 of Article 8 (§85) providing for the payment of original capital of such bank.]*

There was nothing in the old law which preserved to the stockholders this valuable right. By regulation of the Comptroller of the Currency, national banks are required to accord to their shareholders a similar right.

*Proviso added by Act of August 14, 1920.

ARTICLE X.

Renewal of Bank Charters.

§ 98. SECTION 1. Application for Renewal.

Any bank, whether incorporated by special act of the General Assembly, or by the Secretary of State under the general law for the incorporation of banks, may have its charter renewed and its corporate existence extended for a period of thirty years by filing with the Secretary of State at any time within six (6) months prior to the expiration of its charter an application in triplicate, signed with its corporate name and under its corporate seal, in which it shall state the name of the bank, and when and how incorporated, giving the date of its original charter and all amendments thereto, and pray for a renewal of its charter, and upon filing such application, it shall pay to the Secretary of State a fee of \$25.00 to be covered by him into the Treasury of the State. Said bank shall also file with said application a certified abstract from the minutes of the stockholders thereof showing that the application for renewal of its charter has been authorized by a vote of two-thirds ($\frac{2}{3}$) in amount of the entire capital stock of the bank at a meeting of the stockholders, called for the purpose of acting thereon, by resolution of the board of directors, notice of which meeting shall have been mailed to each stockholder, and in case of death to his legal representative, or heirs at law, addressed to his last known residence, at least ten (10) days previous to the date of said meeting.

This is a reenactment, somewhat amplified, of Code, § 2193.

§ 99. SEC. 2. Application to Be Published.

When said application for renewal of charter is filed, the Secretary of State shall certify one of the copies thereof and deliver the same to the bank, and the same shall be published once a week for four (4) weeks, in the newspaper in which are published the sheriff's advertisements of the county in which the bank is located.

There was no requirement for the publication of the application to renew under the old law, but as a renewal is practically an amendment to the charter, the same method as is provided in case of amendment is here provided where charters are sought to be renewed.

§ 100. SEC. 3. Application Referred to the Superintendent of Banks.

Immediately upon filing the application for renewal, the Secretary of State shall transmit one copy thereof to the Superintendent of Banks for investigation by him.

There was no requirement for an investigation before charter was renewed under the old law. The requirement for reference to the Superintendent and the examination and certificate provided for in the next section are analogous to the provisions of the Act of July 12, 1882, amending the National Bank Act, § 9665, U. S. Comp. Stat.

§ 101. SEC. 4. Examination by and Certificate of the Superintendent.

When such application for renewal shall have been referred to the Superintendent of Banks, said Superintendent shall make or cause to be made a special examination to determine the condition of the bank, and if, from such examination, or otherwise, it shall appear to him that said bank is in a safe and satisfactory condition and has complied with the requirements of the law and that such renewal of the charter is proper and has been duly authorized by proper corporate action, he shall within thirty (30) days after the application for renewal shall have been filed with him for examination, issue, under his hand and official seal, a certificate approving the renewal of the charter of such bank, and shall transmit a copy of such certificate of approval to the Secretary of State, who shall enter the same of record in his office. The Superintendent shall also keep of file a duplicate of said certificate in his own office. If it should appear to the Superintendent of Banks from the examination herein provided for, or otherwise, that the condition of said bank is not safe or satisfactory, or that the renewal of its charter is otherwise inexpedient, or that said bank has failed to comply with the law, or that the application for renewal has not been authorized by proper corporate action, the Superintendent shall notify the Secretary of State that he refuses to approve the application for renewal of the charter, and in such event the charter shall not be renewed by the Secretary of State.

§ 102. SEC. 5. Certificate of Publication.

When the copy of the application for the renewal of the charter shall have been published as required by law, the bank shall apply

to the ordinary of the county in which it is located to certify the fact of such publication, and the ordinary shall certify the fact, which certificate shall be filed by the bank in the office of the Secretary of State.

§ 103. SEC. 6. Certificate of Renewal to Be Issued.

When the certificate of the ordinary to the fact of the publication of the application for renewal of charter shall have been filed by the bank in the office of the Secretary of State, and the certificate of the Superintendent of Banks approving the application for renewal shall likewise be filed with the Secretary of State, the Secretary of State shall issue to the bank a certificate under the seal of the State, renewing its charter for a period of thirty (30) years, and the Secretary of State shall record the application for renewal, the certificate of approval of the Superintendent of Banks, the certificate of the ordinary as to publication, and his certificate of renewal, in the order named.

This is practically a ~~re~~enactment of Code, § 2194.

ARTICLE XI.

Private Bank Converted into State Bank.

§ 104. SECTION 1. Private Bank, How Incorporated.

Any person, firm, or voluntary association doing a banking business in this State may convert such private bank into a bank as herein defined by complying with the laws in regard to the incorporation of banks as herein prescribed, and in the event of such incorporation the capital stock may be paid by a transfer of the assets of such private bank, provided the live assets of such bank shall exceed its liabilities by an amount equal to the amount of the capital stock, such assets to be taken at the true value thereof, and the Superintendent of Banks shall cause an examination of said private bank to be made and its assets and liabilities ascertained before authorizing payment of the capital by transfer of such assets and before permitting such private bank to begin business as an incorporated bank.

This Article is intended to afford a simple and easy method for the incorporation of a private bank without injustice to its de-

positors or other creditors. The National Bank Act, § 5154, U. S. R. S.; § 9694, U. S. Comp. Stat., provided for the conversion of State banks into national banking associations. This Article was framed on the general plan of that section, the object being to encourage private banks, which operate on the credit of individuals and without any supervision, to become regularly incorporated State institutions.

§ 105. SEC. 2. Effect of Incorporation.

Upon the incorporation of any private bank as herein provided all the assets of every kind and character, including the real and personal property, and choses in action, belonging to such bank, shall be deemed to be transferred to and vested in such incorporated bank without any deed, transfer, or assignment being executed, and the incorporated bank shall hold and enjoy the same in the same manner and to the same extent as the private bank held and owned the same.

§ 106. SEC. 3. Rights of Creditors and Others.

The rights of the creditors and depositors of such private bank shall not be impaired in any manner by such incorporation, nor shall any liability or obligation for the payment of any money due or to become due, or any claim or demand in any manner or for any cause existing against such private bank be in any manner released or impaired thereby, and all the rights, obligations and relations of all the parties, creditors, depositors and others shall remain unimpaired by such incorporation. But such incorporated bank into which such private bank shall be converted shall succeed to all obligations, trusts and liabilities and be held liable to pay and discharge all such debts and liabilities and to perform all such trusts in the same manner as though such incorporated bank had itself incurred the obligation or liability, and no suit or other proceeding then pending before any court or tribunal in which such private bank is a party shall be deemed to have abated or been discontinued by reason of any such incorporation but the same may be prosecuted to final judgment in the same manner as if such private bank had not been so converted and the incorporated bank may be substituted in place of the private bank by order of the court in which such action, suit or proceeding may be pending. Such incorporated bank shall likewise be subject to be sued in any court having jurisdiction upon any cause of action against such converted private bank, in the same manner as if such cause of action had originated against such incorporated bank.

ARTICLE XII.

National Bank Converted into State Bank.

§ 107. SECTION 1. National Bank, How Incorporated as State Bank.

Whenever any National Banking Association organized under the Acts of Congress and located in this State shall, under the provisions of any Act of Congress, be authorized to dissolve its organization as such national banking association, and shall have taken the action required by such Act of Congress to effect such dissolution, a majority of the directors—in no event less than five (5)—of such dissolved association, by authority of a resolution passed by not less than two-thirds ($\frac{2}{3}$) of the stockholders, at a meeting of such stockholders called for the purpose of taking such action, notice of which shall have been given to each stockholder or to the personal representative or heirs at law of any deceased stockholders, addressed to his last known residence, not less than ten (10) days previous to the date of such meeting, or upon the authority in writing of the owners of two-thirds ($\frac{2}{3}$) of the capital stock of such association, may apply to the Secretary of State to become incorporated under the terms and provisions of this act, and upon the filing of such application in the office of the Secretary of State and complying with the law in regard to the incorporation of banks as herein prescribed, the stockholders of such national banking association may become incorporated as a State bank.

The National Bank Act, § 5154, U. S. R. S.; § 9894, U. S. Comp. Stat., provided for the conversion of State banks into national banking associations. This Article is intended to provide for the converse, authorizing national banks to become State banks and providing the method by which this may be accomplished. The method is substantially the same as that provided for the conversion of a State bank under the National Bank Act. A similar provision is found in the New York law, § 104, this section following that in substance.

§ 108. SEC. 2. Capital Stock, How Paid.

In the event of the incorporation of such dissolved national banking association as a State bank as herein provided, the capital stock may be paid by a transfer of the assets of such dissolved national banking association, provided the live assets of such association shall exceed its liabilities by an amount equal to the amount of

the capital stock, such assets to be taken at the true value thereof, and the Superintendent of Banks shall cause an examination of such dissolved national banking association to be made and its assets and liabilities ascertained before authorizing the payment of the capital by a transfer of such assets and before permitting it to begin business as a State bank.

§ 109. SEC. 3. Effect of Such Incorporation.

Upon the incorporation of any dissolved national banking association as herein provided for, all the assets of every kind and character, including the real and personal property, and choses in action, belonging to such dissolved association, shall immediately, by operation of law, and without any conveyance or transfer, be vested in and become the property of such State bank.

The directors of such dissolved association at the time of its dissolution shall be the directors of the bank created in pursuance hereof until the first annual election of directors thereafter, and shall have power to take all necessary measures to perfect its organization and adopt such regulations concerning its business and management as may be proper and just and consistent with the law.

§ 110. SEC. 4. Rights of Creditors and Others.

The rights of the creditors and depositors of any dissolved national banking association that shall be so converted into a State bank shall not be impaired in any manner by such conversion, nor shall any liability or obligation for the payment of any money due or to become due, or any claim or demand in any manner or for any cause existing against such national banking association, or against any stockholder thereof, be in any manner released or impaired thereby, and all the rights, obligations and relations of all the parties, creditors, depositors, and others shall remain unimpaired by such conversion. But such bank into which the association shall be converted shall succeed to all obligations, trusts and liabilities and be held liable to pay and discharge all such debts and liabilities and to perform all such trusts in the same manner as though such bank into which the association shall have become converted had itself incurred the obligation or liability, and the stockholders of the national banking association shall continue subject to all the liabilities, claims and demands existing against them as such at or before such con-

version; and no suit, action or other proceeding then pending before any court or tribunal in which any association that may be so converted is a party shall be deemed to have abated or been discontinued by reason of any such conversion, but the same may be prosecuted to final judgment in the same manner as if said conversion had not taken place, or the bank into which the association shall have been converted may be substituted in the place of any association so converted by order of the court in which such action, suit or proceeding may be pending. Such State bank shall likewise be subject to be sued in any court having jurisdiction upon any cause of action against such association in the same manner as if such cause of action had originated against such State bank.

ARTICLE XIII.

Merger or Consolidation of Banks.

§ 111. SECTION 1. Merger or Consolidation, How Accomplished.

Any two or more banks are hereby authorized to merge one or more of said banks into another of them, or to consolidate in the following manner:

The respective boards of directors of said banks may enter into and make an agreement, under their corporate names and seals, for the merger of one or more of said banks into another of them, or for the consolidation of the contracting banks, prescribing the terms and conditions thereof, and the mode of carrying such merger or consolidation into effect, which agreement shall be subject to the approval of the Superintendent of Banks. Said agreement shall provide the name that such bank shall have, upon and after such merger or consolidation, which may be the name of any one of the banks merged or the combined names of two or more of the consolidated banks, or such other name as may be agreed upon, and shall name the persons, not less than three (3) nor more than twenty-five (25), who shall constitute the board of directors of such banks after the merger or consolidation shall have taken place, and until a new board of directors shall be elected by the stockholders, and shall provide for a meeting of the stockholders of the merged or

consolidated banks within thirty (30) days after the merger or consolidation, to elect such board of directors, with such temporary provisions for conducting the affairs of the merged or consolidated banks meanwhile, as shall be agreed upon.

The Bank Bureau Act, Code, § 2303, provided that "A bank, which is in good faith winding up its business for the purpose of consolidating with some other bank, may transfer its assets and liabilities to the bank with which it is in process of consolidation, but no such consolidation of banks shall be made without the consent of two-thirds of the stock of each bank, and not then to defeat or defraud any of the creditors in the collection of their claims against said banks, or either of them." This is the only authority under the old law for the consolidation or merger of banks. It will be seen that the machinery by which such consolidation was to be accomplished was not provided. This Article is intended not only to authorize such consolidation, but to provide how it may be accomplished, and to preserve the rights of creditors and stockholders of the consolidating banks. Congress, by the Act of November 7, 1918, § 9698 (a, b), U. S. Comp. Stat., provided for the consolidation of national banking associations, the provisions, while not so full, being quite similar to those of this Article. This section follows closely §§ 487 and 488 of the New York law. On September 29, 1919, Alabama adopted a similar statute.

§ 112. SEC. 2. Submission of Agreement to Stockholders.

Such agreement for the merger or consolidation of two or more banks, after the same shall have been approved by the Superintendent of Banks, shall be submitted to the stockholders, respectively, of each of such banks at a meeting thereof to be called upon at least ten (10) days' written notice, specifying the time, place and object thereof, addressed to each stockholder at his last known postoffice address, and if such agreement shall be approved at each of such meetings of the respective stockholders, separately or at any adjournment thereof, by the affirmative vote of stockholders owning at least two-thirds ($\frac{2}{3}$) of the stock, the same shall be the agreement of such bank. A certified copy of the proceedings of such meetings, respectively, signed by the chairman and secretary thereof respectively, and under the seals of the banks, respectively, shall be evidence of the holding and action of such meetings. Such certified copies shall be filed in the office of the Superintendent of Banks, and thereupon such banks shall be merged or consolidated as specified in such agreement, and the bank into which the other or others are merged, or the consolidated bank, as the case may be, shall thereafter have the new name specified in such agreement and the provisions of such agreement shall be carried into effect as therein provided.

Similar provision is made in the New York law, § 490.

§ 113. SEC. 3. Notice of Merger or Consolidation.

Notice of the merger or consolidation of said banks, in the corporate names, respectively, of the banks so merged or consolidated, shall be published once a week for four (4) weeks in the newspaper which publishes the sheriff's advertisements of the county in which said banks so merged or consolidated are located; and if the banks so merged or consolidated are in different counties, such notice shall be published in such newspaper in each county. Such notice shall give the name of the banks into which the other or others shall be merged, or the name of the consolidated bank, and the place at which the office of such merged or consolidated bank shall be located, and it shall state that such merged or consolidated bank has taken over the assets of the banks, respectively, entering into the consolidation or merger agreement, and has assumed the liabilities of such banks, including the liability to depositors.

§ 114. SEC. 4. Surrender of Original and Issue of New Certificates of Stock.

The bank into which the other or others have been merged, or the consolidated bank as the case may be, shall have the right to require the return of the original certificates of stock held by each stockholder in each or either of the banks, and in lieu thereof to issue new certificates for such number of shares of the bank into which the other shall have been merged, or of the consolidated bank, as under the agreement of merger or consolidation the said stockholders may be entitled to receive.

This section follows the New York law, § 495.

§ 115. SEC. 5. Effect of Merger or Consolidation.

Upon the merger or consolidation of any banks in the manner herein provided, all and singular, the rights, franchise, duties and liabilities, and the interests of the bank or banks so merged or consolidated and all the assets of every kind and character, including the real and personal property and choses in action thereunto belonging, shall be deemed to be transferred to and vested in such bank into which the other or others has been merged or in the consolidated bank, without any deed, transfer or assignment, and said bank shall hold, enjoy and be subject to the same in the same manner and to the same extent as the merged or con-

solidated banks, respectively, had, held, owned, enjoyed, and was subject to the same.

Similar provision is made in the New York law, § 494.

§ 116. SEC. 6. Rights of Creditors and Others.

The rights of creditors of any bank that shall be so merged or consolidated shall not be impaired in any manner by any such merger or consolidation; nor shall any liability or obligation for the payment of any money due or to become due, or any claim or demand in any manner or for any cause existing against such bank, or against any stockholder thereof, be in any manner released or impaired; and all the rights, obligations and relations of all the parties, creditors, depositors, and others shall remain unimpaired by such merger or consolidation. But such bank into which the other or others shall be merged, or the consolidated bank, as the case may be, shall succeed to all obligations, trusts, and liabilities and be held liable to pay and discharge all such debts and liabilities and to perform all such trusts in the same manner as though such bank into which the other or others shall have become merged, or the consolidated bank had itself incurred the obligation or liability; and the stockholders of the respective banks shall continue subject to all the liabilities, claims and demands, existing against them as such at or before such merger or consolidation; and no suit, action, or other proceeding then pending before any court or tribunal in which any bank that may be merged or consolidated is a party shall be deemed to have abated or been discontinued by reason of any such merger, but the same may be prosecuted to final judgment in the same manner as if said bank had not entered into said agreement, or the bank into which the others shall have been merged, or the consolidated bank, as the case may be, may be substituted in the place of any bank so merged or consolidated by order of the court in which such action, suit or proceeding may be pending. Such bank into which the other or others have been so merged, or the consolidated bank, shall be subject to be sued in any court having jurisdiction, upon any cause of action against any of the banks so merged or consolidated, in the same manner as if such cause of action had originated against such bank into which the other or others have been merged or against such consolidated bank.

Similar provision is made in the New York law, § 494.

ARTICLE XIV.

Voluntary Liquidation and Dissolution.

§ 117. SECTION 1. Two-Thirds Vote of Stockholders Required.

Any bank may go into voluntary liquidation and be closed, and may surrender its charter and franchise as a corporation to the State by the affirmative vote of its stockholders owning two-thirds of its stock, such vote to be taken at a meeting of the stockholders duly called by resolution of the board of directors, written notice of which, stating the purpose of the meeting, shall have been mailed to each stockholder, or in case of death to his legal representative or heirs at law, addressed to his last known residence at least ten (10) days previous to the date of said meeting.

The old law made no provision for voluntary liquidation. Under § 5220, U. S. R. S.; § 9808, U. S. Comp. Stat., a national bank may go into liquidation by a two-thirds vote of its stock.

The New York law, § 486, authorizes voluntary liquidation and dissolution, the method being quite similar to that prescribed in this Article. Alabama adopted a similar statute September 30, 1919.

§ 118. SEC. 2. Approval of Superintendent.

Whenever stockholders shall by such vote at a meeting regularly held for the purpose, notice of which shall have been given as herein provided, decide to liquidate said bank, a certified copy of all the proceedings of the meeting at which said action shall have been taken, verified by the oath of the president and cashier, shall be transmitted to the Superintendent of Banks for his approval. If the Superintendent of Banks shall approve the same, he shall issue to the said bank, under his hand and official seal, a permit for such purpose. No such permit shall be issued by the Superintendent of Banks until said Superintendent shall be satisfied that provision has been made by such bank to satisfy and pay off all depositors and all other creditors of such bank. If not satisfied, the Superintendent shall refuse to issue a permit and shall be authorized to take possession of said bank and its assets and business and hold the same and liquidate said bank in the manner in this act provided.

This section is in line with the general scheme of the act, to give the Superintendent direct control over every step in the life of a

bank from its initial organization until its final liquidation by whatever process accomplished.

§ 119. SEC. 3. Notice of Liquidation.

In the event the Superintendent of Banks shall approve the voluntary liquidation of said bank, the directors shall cause to be published in the newspaper in which the sheriff's advertisements of the county in which the bank is located, a notice that the bank is closing up its affairs and going into liquidation, and notifying its depositors to withdraw their deposits and its creditors to present their claims for payment.

A similar provision is contained in § 5221, U. S. R. S.; § 9808, U. S. Comp. Stat.

§ 120. SEC. 4. Examination of and Reports by Liquidating Bank.

When any bank shall be in process of voluntary liquidation, it shall be subject to examination by the Superintendent of Banks and shall furnish such reports from time to time as may be called for by the Superintendent.

The regulations promulgated by the Comptroller of the Currency make similar requirements of national banks in voluntary liquidation.

§ 121. SEC. 5. Unpaid Deposits and Claims to Be Provided for.

After paying all the creditors of said bank and all depositors whose claims have been presented and allowed, the directors shall cause to be deposited in such bank as may be designated by the Superintendent of Banks, to the credit of the Superintendent, an amount sufficient to cover all unpaid and unclaimed deposits, and all other claims against said bank which for any reason may not have been paid. Such sum shall be held by the Superintendent in the same manner as deposits made by him to cover unpaid deposits of banks liquidated by him or under his direction.

§ 122. SEC. 6. Remaining Assets Distributed to Stockholders.

After paying all debts against said bank and all amounts due to the depositors thereof and after depositing a sum sufficient to pay any unclaimed or unpaid deposits or other valid claims as herein provided, and after deducting the expenses of liquida-

tion, the remaining assets shall be distributed pro rata among the stockholders in proportion to the number of shares held by each respectively.

§ 123. SEC. 7. Surrender of Charter.

When all amounts due by said bank shall have been paid or provided for as herein provided and all remaining assets shall have been distributed to the stockholders, the bank may file in the office of the Secretary of State an application, in triplicate, signed with its corporate name and under its corporate seal, in which it shall state the name of the bank, the place where it is located, the date of its original charter, and of all amendments thereto, and the fact that all debts due by the bank have been paid or provided for, and that its assets have been distributed to its stockholders, and that it desired to surrender its charter and franchise to the State. On filing such application, the bank shall pay to the Secretary of State a fee of \$25.00 to be covered by him into the State Treasury. Said bank shall also file with said application a certified copy of the resolution of the stockholders approving the surrendering of such charter and franchises, which resolution must be adopted by an affirmative vote of not less than two-thirds ($\frac{2}{3}$) of all the stockholders at a meeting called for the purpose of taking such action as herein provided.

A corporation can not surrender its charter and franchise except by express authority and permission of the General Assembly. *Davis v. White*, 134 Ga. 274. By the Act of 1910, Code, § 2823 (b), such authority was granted to corporations organized under charters granted by the Superior Courts. This and the following sections grant a like authority to banks, the method provided following in general plan that of the Act of 1910.

§ 124. SEC. 8. Application to Be Published.

When the said application to surrender the charter is filed, the Secretary of State shall certify one of the copies thereof and deliver the same to the bank, and the same shall be published by the bank in the newspaper in which the sheriff's advertisements of the county in which the bank is located are published, once a week for four weeks.

§ 125. SEC. 9. Application Referred to Superintendent of Banks.

Immediately upon the filing of the application to surrender the charter, the Secretary of State shall transmit one copy thereof to the Superintendent of Banks for investigation by him.

§ 126. SEC. 10. Examination by and Certificate of Superintendent.

When such application to surrender charter shall have been referred to the Superintendent of Banks, the said Superintendent shall immediately investigate or cause an investigation to be made, and shall satisfy himself that the surrender of such charter and the dissolution of such bank may be allowed without injustice to any stockholder, or to any person or corporation having any claim or demand of any character against said bank, and that all assets of said bank have been distributed and all depositors and creditors paid or properly provided for, and that the surrender of the charter and franchises has been authorized by proper corporate action, and that all requirements of law have been complied with. If so satisfied the Superintendent of Banks shall within thirty (30) days after the application for surrender of charter shall have been filed with him for examination, issue under his hand and official seal a certificate approving the application, and shall transmit a copy of such certificate of approval to the Secretary of State, who shall enter the same of record in his office. The said Superintendent shall also keep of file a duplicate of said certificate in his own office. If the Superintendent shall not be satisfied that the surrender of the charter as proposed is proper and expedient or that the law for such cases made and provided has been fully complied with, he shall within thirty (30) days after the filing of said copy with him, notify the Secretary of State that he refuses to approve the application, and in such event no order shall be granted by the Secretary of State dissolving the bank, or authorizing the surrender of its charter.

§ 127. SEC. 11. Certificate of Publication.

When the copy of the application to surrender the charter shall have been published as required by law the bank may apply to the ordinary of the county in which it is located to certify the fact of such publication, and the ordinary shall certify the fact,

which certificate shall be filed by the bank in the office of the Secretary of State.

§ 128. SEC. 12. Order Dissolving Bank.

When the certificate of the ordinary to the fact of the publication of the application to surrender the charter shall be filed by the bank with the Secretary of State, and the certificate of the Superintendent of Banks approving the application shall likewise be filed with the Secretary of State, the Secretary of State shall pass an order under the seal of the State accepting the surrender of the charter and franchises and dissolving the bank, and the Secretary of State shall record the application, the certificate of approval of the Superintendent of Banks, the certificate of the ordinary as to the publication, and his order accepting the surrender of the charter and franchises and dissolving the bank, in the order named; and the said bank shall thereupon be finally dissolved for all purposes whatsoever.

ARTICLE XV.

Forfeiture of Charter.

§ 129. SECTION 1. Causes of Forfeiture.

Bank charters are subject to forfeiture on the same general ground as are those of other corporations, and also:

1. For the violations of any of the provisions of their charters.
2. For the violation of any obligation imposed by law.
3. Whenever it is demanded by specific enactment.
4. For refusal or neglect for a period of thirty (30) days, after the written order of the Superintendent of Banks, to comply with any requirement lawfully made upon it by such Superintendent.

The first three grounds of forfeiture were contained in Code, § 2349, being codified from the Acts of 1840 and 1842. The fourth ground was added by the Bank Bureau Act of 1907, Code, § 2347. The franchise of a national bank may be forfeited upon similar grounds, § 5239, U. S. R. S.; § 9831, U. S. Comp. Stat.

§ 130. SEC. 2. Proceedings to Forfeit.

The Superintendent of Banks in the name of the State is authorized to institute quo warranto or other appropriate proceed-

ings to vacate and forfeit the charter of any bank, where the bank has done or omitted any such act or acts as under the law authorizes a forfeiture of its charter.

Under the old law, re-enacted by the Bank Bureau Act, the charter of a bank could be forfeited only by proceedings instituted by the Attorney-General by direction of the Governor in the Superior Court of the county in which the bank was located, Code, § 2350. The method provided by this section, which follows § 5239, U. S. R. S.; § 9831, U. S. Comp. Stat., and § 49 of the Alabama law, is simpler and more direct.

§ 131. SEC. 3. Liquidation Where Charter Forfeited.

Where the charter of any bank shall be forfeited, the Superintendent of Banks shall take charge of the business and assets of such bank and proceed to liquidate it in the same manner as is herein provided in cases where the superintendent takes charge of a bank.

When a charter was forfeited under the old law, a receiver was appointed by the Superior Court to administer the assets. Code, § 2351. Administration by the Superintendent should be more efficient and less expensive. Where the Superintendent administers, he holds the assets as a receiver. *McDavid v. Bank of Bay Minette*, 193 Ala. 341, 69 So. 452.

§ 132. SEC. 4. No Suits for Forfeiture or Liquidation Except by Superintendent.

No suit to forfeit the charter of any bank, or for the liquidation of any bank, or for the appointment of a receiver of any bank, shall be instituted by any person except by and through the Superintendent of Banks in the name of the State. Any person shall have the right to submit to the Superintendent of Banks any facts which under the law would authorize the forfeiture of the charter of a bank, or any facts which would authorize the liquidation of a bank, or the appointment of a receiver therefor, and on such submission being made, it shall be the duty of the Superintendent of Banks to investigate, and if on such investigation, he ascertains that the facts are such as will justify action for forfeiture of the charter, or for the liquidation of the bank, or for the appointment of a receiver, it shall be the duty of the Superintendent to take appropriate action in the premises.

Formerly proceedings could only be instituted by the Attorney-General by direction of the Governor. Code, § 2350. This section follows § 49 of the Alabama law and § 5239, U. S. R. S.; § 9831, U. S. Comp. Stat., in substance.

ARTICLE XVI.

Mandamus Against Superintendent.**§ 133. SECTION 1. Superintendent Subject to Mandamus.**

In the event the Superintendent of Banks should refuse to issue any permit authorizing the incorporation of any bank, or the amendment, renewal or surrender of the charter of any bank, or authorizing any bank to begin business, or any other permit, authority or certificate required to be given or furnished by him before any act or thing shall be permitted or done, or should refuse to do any act or thing authorized or required by this act to be done, the person or persons affected by such failure or refusal, or the bank so affected, may institute appropriate proceedings in the nature of a mandamus against the Superintendent in the Superior Court of the county in which such bank is sought to be incorporated or have its charter amended, renewed or surrendered, to compel him to issue such permit or authority, or to do any such act or thing authorized or required to be done hereunder, which proceeding shall be tried as in other cases of mandamus. Service of such proceedings shall be made on the Superintendent of Banks by second original as now prescribed by law.

The Superintendent being invested with great powers by this act, this Article was inserted to prevent his arbitrary refusal to act in proper cases. Similar provision is made by the Alabama law, § 30.

§ 134. SEC. 2. Trial and Judgment.

On the trial of any such cause the Superintendent shall have the right to introduce evidence to sustain or tending to sustain his action or refusal to act in the premises, and if from the evidence in the case the court is of the opinion that such permit, or authority, or certificate has been wrongfully or improperly refused or withheld by the Superintendent, and that the facts and circumstances authorize and require the granting of such permit, authority, or certificate, or that the Superintendent has wrongfully or improperly refused to do any act or thing authorized or required by this act to be done, and that the same should be done, the court shall render an order, judgment or decree directing the Superintendent of Banks to issue such permit, authority or certificate, or to do such act or thing, and thereupon the

Superintendent shall issue or do the same, and may state in any permit, authority or certificate issued by him under such order, that the same is done by order of the court.

§ 135. SEC. 3. Exceptions.

A bill of exceptions may be sued out by either party who may be dissatisfied with the judgment, and the cause may be carried to the Supreme Court as in other cases of mandamus proceedings.

Judgments in mandamus proceedings are reviewed upon fast writs of error in the same way as are the grant or refusal of injunctions. Code, §§ 5447, 6153.

ARTICLE XVII.

Powers of Banks.

§ 136. SECTION 1. General Powers of Banks Enumerated.

A bank organized under this act shall have power :

1. To have continual succession for the term of thirty (30) years, with the rights of renewal herein provided for, with all corporate powers and privileges herein granted.
2. To sue and be sued.
3. To have and use a common seal, and at pleasure to alter the same.
4. To appoint such officers, agents, and employees as the business of the bank may require, prescribe their duties, and fix their compensation as may be provided by the by-laws.
5. To make such by-laws as may be necessary or proper for the management of its property and the regulation of its affairs.
6. To hold, purchase, encumber, dispose of, and convey such real and personal property as may be necessary for its uses and business, subject to the restrictions and limitations herein prescribed.
7. To discount bills, notes or other evidences of debt; to receive and pay out deposits, with or without interest; to receive on special deposit, money, bullion, foreign coin, stocks, bonds, or other securities, or other property; to buy and sell foreign or domestic exchange or other negotiable paper; to issue and sell acceptances; to lend money upon personal security, or upon pledges

of bonds, stocks, or securities; to take and receive security, by mortgage or otherwise, on property real or personal.

Loans and discounts are synonymous terms. *National Bank of Gloversville v. Johnson*, 104 U. S. 271, 26 L. Ed. 742.

"A discount by a bank means, *ex vi termini*, a deduction or draw-back made upon its advances or loans of money, upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank." *Fleckner v. The Bank of the United States*, 21 U. S. 338, 351, 5 L. Ed. 631.

"A deposit may be for a specific purpose, as where money or property is delivered to the bank for some particular designated purpose, as a note for collection, money to pay a particular note or draft, etc. While such a deposit is sometimes termed a 'special deposit' and partakes of the nature of a special deposit to the extent that title remains in the depositor and does not pass to the bank, yet it seems more accurate to look on this as a distinct class of deposit. In using deposits made for the purpose of having them applied to a particular purpose, the bank acts as the agent of the depositor; and if it should fail to apply it at all, or should misapply it, it can be recovered as a trust deposit; and the agency created by the deposit is revocable by the depositor at any time before the purpose of the deposit has been accomplished." *Cooper v. National Bank of Savannah*, 21 Ga. App. 364.

8. To increase or decrease its capital stock in the manner herein provided.

9. To increase or decrease the number of its directors in the manner herein provided.

This Section reenacts Code, § 2266, which was codified from the Act of December 20, 1893, the general law for the incorporation of banks, except that to paragraph six is added "subject to the restrictions and limitations herein prescribed"; in paragraph seven is inserted "to issue and sell acceptances," and paragraph nine is added.

Pursuant to the amendment to the Constitution authorizing the Secretary of State to grant charters to banks (and certain other corporations), a general law for the incorporation of banks was adopted on October 21, 1891 (Acts, 1890-91). Banks incorporated under this act were given not only general banking powers, but also many of the powers usual to trust companies. This act was superseded by the Act of 1893, which so far as the powers of banks incorporated under it are concerned remained unchanged until this section was adopted. There are still a considerable number of banks organized and doing business under special charter granted by the General Assembly before the amendment of the Constitution. Reference must be had to these charters to determine the powers of such banks. By the Act of 1896, p. 35, Code, § 2271, the Secretary of State was authorized to grant amendments to these special charters so as to incorporate therein any of the provisions of the general law for the incorporation of banks or any amendments thereof.

"All corporations have the right to sue and be sued, to have and use a common seal, to make by-laws, binding on their own members, not inconsistent with the laws of this State, and of the United States, to receive donations by gift or will, to purchase and hold such property, real or personal, as is necessary to the purpose of their organization, and to do all such acts as are necessary for the legitimate execution of this purpose." Code, § 2216.

"Where a banking corporation acquires possession of property either by a lien thereon, or by the purchase of the same for the payment of a debt due to it, and expends money on it, or furnishes supplies either for its preservation or to carry on the business in which such property is employed, with a view to rendering it productive, in order to satisfy the debt the bank holds against the former owner of the property, it is not chargeable with exceeding its corporate powers by engaging in a business beyond the scope and purpose of its creation." *Reynolds v. Simpson*, 74 Ga. 454.

ARTICLE XVIII.

Liability of Stockholders.

§ 137. SECTION 1. Stockholders' Liability, Extent of.

A bank incorporated under this act shall be responsible to its creditors to the extent of its capital and its assets; and each stockholder shall be individually liable for all the debts of said bank to the extent of the balance remaining unpaid on his or her shares of stock; and said stockholders shall be further and additionally individually liable, equally and ratably (and not one for another) to depositors of such bank for all moneys deposited therein, in an amount equal to the face value of their respective shares of stock; it being the true intent and purpose of this section, that as to depositors for all moneys deposited with said bank, there shall be an individual liability upon each stockholder of such bank, over and beyond the par value of his or her original shares of stock in amount to the face value of said shares of stock; provided, that said liability of the stockholders shall not prevent depositors from having equal rank with all other creditors upon the capital, property, and assets of said bank.

This reenacts Code, § 2270, codified from the Act of 1893, the general law for the incorporation of banks. This was the first general law imposing such liability. Whether prior to this act such liability existed in any given case and the extent thereof depended on the terms of the special charter under which the bank was organized. *Wheatley v. Glover*, 125 Ga. 710. Where the charter made the stockholders liable, the liability could be enforced by a receiver appointed under authority of the Bank Bureau Act of 1907. *Harris v. Taylor*, 148 Ga. 663.

§ 138. SEC. 2. Exception for Trustees and Other Fiduciaries.

Persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be

liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust fund would be, if living and competent to act and hold the stock in his own name: *Provided*, That nothing herein contained shall relieve any executor, administrator, guardian or trustee from individual liability as a stockholder upon any unauthorized subscription for or investment in bank made by such executor, administrator, guardian or trustee.

This section is taken from the National Bank Act, § 5152, U. S. R. S.; § 9890, U. S. Comp. Stat., the proviso making the fiduciary liable for unauthorized investments being added.

§ 139. SEC. 3. Liability of Stockholder After Transfer of Stock.

Whenever a stockholder in any bank is individually liable under the charter, and shall transfer his stock, and have such transfer entered upon the books of the bank or give to the bank written notice thereof, he shall be exempt from such liability by such transfer, unless such bank shall fail within six (6) months from the date of the entry of such transfer, or from the delivery of such notice to the bank.

This is a reenactment of Code, § 2247, the clauses "and have such transfer entered upon the books of the bank or give to the bank written notice thereof," and "or from the delivery of such notice to the bank" being added for the purpose of clearing up the doubt existing as to when the transfer should be regarded as complete.

§ 140. SEC. 4. Liability When Bank Fails.

The stockholder in whose name the capital stock stands upon the books of such bank at the date of its failure, shall be primarily liable to respond upon such individual liability; but upon proof made that any stockholder at the date of the failure is insolvent, recourse may be had against the person from whom such insolvent stockholder received his stock, if within a period of six (6) months prior to the date of the failure of such bank.

This reenacts Code, § 2248.

One recovery only can be had, where successive owners of same shares are alike liable, one of them because he owns the shares now, another because of past ownership and failure upon transferring to give notice prescribed by § 1496 of Code of 1882, though creditors entitled to recover from each as though liability wholly his own. *Chatham Bank v. Brobston*, 99 Ga. 801 (6), (27 S. E. 790).

Rule for locating burden among the successive owners themselves is that the loss should fall ultimately upon the successive owners in the inverse order of their ownership in point of time; special facts may dictate different order. *Chatham Bank v. Brobston*, 99 Ga. 801 (7), (27 S. E. 790).

§ 141. SEC. 5. Failure of Bank Defined.

A bank shall be deemed to have failed within the purview of this act whenever such bank shall have become insolvent and its assets and business shall have been surrendered to or taken possession of by the Superintendent of Banks.

This section was inserted for the purpose of making clear the right of the Superintendent to enforce the liability of the stockholders whenever an insolvent bank should be taken charge of by him. See § 70 of the Act.

§ 142. SEC. 6. Premature Organization.

Persons who organize a bank and transact business in its name before the minimum capital stock under this act has been subscribed for and before a permit has been issued by the Superintendent of Banks authorizing the transaction of business in the name of such bank, are jointly and severally liable to creditors to make good such minimum capital stock with interest; and liability under this section shall be enforced as hereinafter provided.

This section reenacts with special reference to banks, Code, § 2220, which was applicable to all corporations organized under the laws of Georgia. Creditors have a right to presume that the minimum capital allowed by the charter has been subscribed, the fact alone of commencement of business created that presumption, to that extent stockholders are liable. *Hill v. Silvey*, 81 Ga. 500.

§ 143. SEC. 7. Liability of Stockholders or Incorporators as Assets.

The individual liability of stockholders and that of persons doing business in the name of a bank before the minimum capital stock is subscribed and before a permit has been issued by the Superintendent of Banks authorizing the bank to begin business, shall be assets of such bank to be enforced only by and through the Superintendent of Banks.

Under Code, § 2249, the stockholders' liability was an asset "to be enforced by the assignee, receiver or other officer having the legal right to collect, marshal and distribute the assets."

§ 144. SEC. 8. Collateral Liability Not Affected by Dissolution.

The surrender or forfeiture of a charter of any bank, or its dissolution for any cause, shall not in any manner affect any collateral or ultimate or other liability legally incurred by any of its stockholders, directors or officers.

This is a reenactment of Code, § 2246.

ARTICLE XIX.

Regulation of the Business of Banking.

§ 145. SECTION 1. Board of Directors, Number and Election.

The affairs of each bank shall be managed by a board of not less than three (3) nor more than twenty-five (25) directors who shall be elected by the stockholders at a meeting to be held at any time before the bank is authorized by the Superintendent of Banks to commence the business of banking, and afterwards at meetings to be held annually at such time as may be fixed by the by-laws of the bank. The directors shall hold office for one (1) year and until their successors are elected and have qualified. A bank, at any annual meeting of the stockholders for the election of directors, provided notice thereof be given in the notice of the annual meeting, may, by a majority vote of all the stockholders of such bank, fix or change by resolution the number of directors, provided the number of directors shall not be less than three (3) nor more than twenty-five (25), which number when so fixed shall be the lawful number of directors of such bank until again changed in like manner. Certified copies of all resolutions fixing or changing the number of directors under this section shall be immediately filed with the Superintendent of Banks.

This reenacts in substance part of Code, § 2302, adding the provision for changing the number of directors. Under the old law the number of directors could be changed only by an amendment of the charter, Code, § 2267.

The control of the bank is vested in the board of directors. *Merchants' Bank of Macon v. Rawls & Taylor*, 7 Ga. 196.

The board of directors exercise the corporate powers of the bank. *Wood Hydraulic Hose Mining Co. v. King*, 45 Ga. 34.

A director may resign at any time. *Briggs v. Spalding*, 141 U. S. 132, 35 L. Ed. 662.

Bank directors are often styled trustees, but not in any technical sense. The relation between the corporation and them is rather that of principal and agent. The degree of care required of them is the same as that which men of ordinary prudence exercise in regard to their own affairs. *Briggs v. Spalding*, 141 U. S. 132, 35 L. Ed. 662.

Directors primarily represent the corporation and its stockholders, but when the corporation becomes insolvent they are bound to manage the remaining assets for the benefit of its creditors, and can not in any manner use their powers for the purpose of obtaining a preference or advantage to themselves. Code, § 2222.

§ 146. SEC. 2. Qualifications of Directors.

Every director of a bank having a capital stock of fifteen thousand (\$15,000.00) dollars or more and not exceeding fifty thousand (\$50,000.00) dollars, must own in his own right at least two (2) shares of such stock; upon which all installments which are due shall have been fully paid, and every director of a bank having a capital stock of more than fifty thousand (\$50,000.00) dollars must so own at least five (5) shares of the capital stock of the bank of which he is a director. Any director who ceases to be the owner of the number of shares herein required or who fails to pay any installment thereon when the same becomes due, or who becomes in any other manner disqualified, shall thereby vacate his place as a member of the board.

Under Code, § 2267, directors were required to be "owners and holders of one or more shares of the capital stock in good faith." The last sentence of the section is taken substantially from § 5146, U. S. R. S.; § 9684 U. S. Comp. Stat.

§ 147. SEC. 3. Oath of Directors.

Each director, when elected, shall take an oath that he will, so far as the duty devolves upon him, diligently and honestly administer the affairs of the bank, and that he will not knowingly violate, or willingly permit to be violated, any of the provisions of law applicable to such bank or any of the by-laws thereof; and that he is the owner in good faith and in his own right, of the number of shares of stock required by this act, standing in his own name on the books of the bank. Such oath shall be subscribed by the director making it, and certified by the officer before whom it is taken, and shall be immediately transmitted to the Superintendent of Banks, and filed and preserved in his office.

This section is taken substantially from § 5147, U. S. R. S.; § 9685, U. S. Comp. Stat. That section requires the director also to swear that the stock standing in his name is not hypothecated or pledged in any way as security for any loan or debt. New York requires an oath of similar character from directors. § 124, N. Y. law.

§ 148. SEC. 4. Meetings of the Board of Directors.

The board of directors shall hold regular meetings at such times as may be fixed by the by-laws, at least once each month, and shall at all times be subject to call by the president or by any two members of the board. A majority of the board of directors shall constitute a quorum for the transaction of business. Correct

written minutes of all meetings shall be kept in well-bound permanent books kept for that purpose, and the minutes of each meeting shall be signed by the chairman and secretary thereof, and shall record the names of the directors present at such meeting. At each meeting the minutes of the preceding meeting shall be read, corrected and approved. The minute book shall be submitted to the examiner at each of their semiannual examinations, and shall be examined, and the fact of such examination shall be noted in the examiner's report, and the minute book.

The Bank Bureau Act, Code, § 2302, required the directors to hold at least one meeting each three months and to keep correct minutes signed by two officers. New York also requires directors' meetings to be held at least once each month. § 129, N. Y. law.

Where a corporation is empowered to act through its board of directors or a committee, individual or separate action of the members of such board is not sufficient, the agent of the corporation is the board itself acting in its organized capacity and not its members acting independently of its meetings. *Monroe M. Co. v. Arnold*, 108 Ga. 449.

§ 149. SEC. 5. Semiannual Examinations by Directors.

It shall be the duty of the board of directors of every bank, at least once in each six (6) months, to count the cash and examine fully into the books, papers, and affairs of the bank of which they are directors, and particularly into the loans and discounts thereof, with the special view of ascertaining the value and security thereof, and the collateral security, if any, given in connection therewith, and into such other matters as the Superintendent of Banks may require. Such directors may conduct such count and examination by a committee of at least three (3) of its members; and shall have the power to employ certified public accountants or other expert assistance in making such examinations, if they deem the same necessary. Within ten (10) days after the completion of each of such examinations, a report in writing thereof, sworn to by the directors making the same, shall be made to the board of directors, which report shall be spread upon the minutes of said board; and the original thereof shall be placed on file in said bank, and a duplicate thereof filed with the Superintendent of Banks.

This and § 150, 151 and 152 are an amplification of Code, § 2302, taken from the Bank Bureau Act, that section also requiring semi-annual examinations by the directors, the charging off of worthless paper, entering the report on the minutes, etc. These sections follow to some extent § 130 of the New York law.

§ 150. SEC. 6. Report of Examination, What Must Contain.

Such report shall contain statements in detail, (1) of the assets and liabilities of the bank examined, as shown by the books, together with any deductions from the assets or additions to the liabilities which such directors or committee after such examination may determine to make; (2) of loans, if any, which in their opinion are worthless or doubtful, together with their reasons for so regarding them; (3) of loans made on collateral security which in their opinion are insufficiently secured, giving in each case the amount of the loan, and the name and market value of the collateral, if such collateral has any market value, and if not its actual value as nearly as can be determined; (4) of all overdrafts and separately of overdrafts which are considered worthless or doubtful, or which have been made without authority, with the name of the officer or employee making or approving the same; (5) of all past due paper; (6) of all demand loans upon which no interest has been paid within the last preceding six (6) months; (7) of all loans in excess of the amount authorized herein to be made; (8) of all loans made to the officers, agents, employees, and directors of the bank, with the securities held therefor; and of all loans to firms or corporations in which the officers, agents, employees, or directors of the bank are interested; (9) and of all such other matters and things as may affect the solvency or soundness of the bank. No report shall be held or considered as complying with the provisions of this section unless it shows affirmatively the existence or non-existence of all the items concerning which statements are required. Said directors or such committee shall also in said report make recommendations to the board as to the manner of conducting business by the bank, calling attention to any matters which in their opinion are unauthorized or improper, and suggesting any changes or improvements in the method of conducting the business or handling the affairs of the bank which, in their opinion, will be an improvement upon the system in operation or tend in any way to the safety or soundness of the bank.

§ 151. SEC. 7. Action on Report.

The board of directors at the meeting which such report of the semiannual examination is read shall, by resolution entered on the minutes, require that all debts due to the bank, which are past due for a period of one year and which are not amply secured,

shall be collected, placed in suit or charged to profit and loss; that all past due interest shall be collected upon any note upon which no such interest has been paid within the last preceding twelve (12) months, or that said note shall be collected, put in suit, or charged to profit and loss; and that all assets or claims in favor of the bank, which in the opinion of the directors are worthless or uncollectible, shall also be charged to profit and loss and not included in the list of assets of the bank. Said board shall at such meeting also require that all loans in excess of the amount herein authorized to be made shall be reduced at once so as to bring them within the proper amount.

A certified copy of the resolutions of the board acting on the matters brought to their attention in the report of the semiannual examination shall be filed with the Superintendent of Banks within ten (10) days after said meeting shall have been held.

§ 152. SEC. 8. Failure to Comply with Preceding Section, Result of.

In the event the board of directors of any bank should fail to make an examination every six (6) months, the Superintendent of Banks shall, by an order under his hand and official seal, addressed to the president of the bank, require that a meeting of the board of directors shall be called immediately and that the examination shall be made within ten (10) days after such special meeting of the board, and if such meeting be not so held and such examination made within said time and report thereof made and submitted to the Superintendent of Banks, the said Superintendent shall be authorized to take charge of the bank as in other cases herein provided for wilful refusal to obey the lawful orders of the said Superintendent. If it shall appear from the report of such examination that the bank is carrying as an asset any worthless paper or other property, or that any asset should be charged to profit and loss and not included in the assets of said bank, and the directors at the meeting aforesaid should fail to order such assets charged to profit and loss, or if the Superintendent of Banks shall ascertain from any examination or otherwise that any bank continues to carry as assets any worthless paper or other property which should be charged to profit and loss, the Superintendent shall order the bank to collect or charge to profit and loss all such worthless assets at once, and upon failure to comply with such order, may take possession of such bank as in other cases provided.

§ 153. SEC. 9. Officers.

The board of directors at their first meeting after the annual election shall elect one of their number president. They shall also elect one or more vice-presidents, a cashier, and such other officers and agents as may be provided by the by-laws as or may be required for the prompt and orderly discharge of the business of the bank. Immediately upon their election, a list, giving the names and addresses of the officers elected, certified under the seal of the bank, shall be transmitted to the Superintendent of Banks and be kept on file by him.

Code, § 2302, required the president to be a member of the board of directors; § 5150, U. S. R. S.; § 9688, U. S. Comp. Stat., makes the same requirement.

"Every corporation acts through its officers, and is responsible for the acts of such officers in the sphere of their appropriate duties; and no corporation shall be relieved of its liability to third persons for the acts of its officers by reason of any by-law or other limitation upon the power of the officer, not known to such third person." Code, § 2225.

"Usually the question of discounting paper comes before the board of directors or a committee, and the cashier is but the executive officer to carry out their decision; his duties are ordinarily strictly executive. But beyond his inherent powers, the cashier may be authorized to act for the bank by the organic law, by action of the stockholders, by a vote of the board, by usage and tacit approval." *Morris v. Ga. Loan, etc., Co.*, 109 Ga. 21.

"A bank, by bringing an action upon a contract made in its behalf by one of its officers, ratifies his action in making the contract, and is in law chargeable with knowledge of whatever he knew at the time of so doing." *Singleton v. Bank of Monticello*, 113 Ga. 527.

"Where an agent conspires with the other party, his principal is not bound thereby, nor charged with knowledge of facts thus acquired by his agent." Code, § 3600.

"Notice to the agent of any matter connected with his agency is notice to the principal." Code, § 3599.

Notice to cashier is notice to bank. *Lessee Veasey v. Graham*, 17 Ga. 99. So is notice to president. *Merchants' Bank v. Guilmartin*, 93 Ga. 509. But knowledge of president or cashier is not knowledge of bank where he is interested adversely to the bank. *Savannah Bank & Trust Co. v. Hartridge*, 73 Ga. 223; *People's Bank v. Exchange Bank*, 116 Ga. 820.

§ 154. SEC. 10. Bonds of Officers.

The board of directors shall require the cashier and any and all other officers, [and employees]* having the care, control, or handling of any of the funds of the bank, to give bond with a regular incorporated surety company, qualified to do business in the State of Georgia, as surety, in such amounts as the board shall fix, the premium on such bond to be paid by the bank. Such bonds

*Inserted by Act of August 14, 1920.

shall be held by such custodian as the board of directors may designate.

That part of this section which requires that the surety shall be a surety company and the premium shall be paid by the bank is new. The rest of the section is taken from Code, § 2304.

§ 155. SEC. 11. Borrowing for Personal Use by Officers and Employees Prohibited Except by Permission of the Directors.

No officer, [director]* agent, or employee of any bank shall use or borrow directly or indirectly for himself, or for any firm or partnership of which he is a member, any money or other property belonging to any bank of which he is such officer, director, agent or employee without the express authority and permission previously obtained of a majority of the directors or of the members of a committee of the board of directors authorized to act, which permission shall be evidenced by the written signatures of such directors, the borrower not voting or participating in any way in passing upon any loan or discount in which he may be interested.

This section reenacts Code, § 2236 (Act 1887, p. 94), adding directors and employees to officers and agents and requiring that the permission of the directors or committee shall be "previously obtained" and evidenced by their "written signatures."

Officer of bank, though having general authority to make loans, can not bind the bank by lending its money to himself or to another officer for his benefit. *McGregor v. Witham*, 126 Ga. 702.

§ 156. SEC. 12. Loans to Officers.

No bank shall lend any officer, director, agent, or employee any amount whatever except upon good collateral or other ample security; and no such loan shall be made until after it has been approved by a majority of the directors, or by the members of a committee of the board of directors authorized to act, as in the preceding section provided.

The amending Act of August 14, 1920, as passed by the Senate struck out the word "director" from this section. The House, however, omitted the provision, and the Senate concurred, leaving the section unchanged.

Code, § 2275, from which this section is taken, only required the approval of the directors where the loan exceeded ten per cent. of the capital of the bank. That section only applied to officers. This adds directors, agents and employees. This section authorizes a committee to make the loan, as well as the majority of the directors.

The section is quite similar to § 20 of the Alabama act.

*By a clerical error the word "director" was omitted in the enrolled copy of the Act. It was inserted by the Act of August 14, 1920.

§ 157. SEC. 13. Loans by Bank, Limit of.

No bank shall be allowed to lend to any one person, firm, or corporation more than thirty (30) per cent. of its capital, unimpaired surplus and undivided profits. And no loan shall be made in excess of ten (10) per cent. of the capital except upon good collateral or other ample security and with the approval of a majority of the directors, or of a committee of the board of directors authorized to act, which approval shall be evidenced by the written signatures of said directors or the members of said committee. In estimating loans to any person, all amounts loaned to firms and partnerships of which he is a member shall be included: *Provided, however,* That a bank may buy from or discount for any person, firm, or corporation, bills of exchange drawn in good faith against actually existing values, or commercial or business paper actually owned by the person negotiating the same, in addition to loans directly made to the person, firm or corporation selling the same, such purchase or discount, if in excess of ten (10) per cent. of the capital, to be approved in writing by a majority of the directors or by a committee of such board authorized to act; *And provided,* That the limit of loans herein fixed shall not apply to *bona fide* loans made upon the security of agricultural, manufactured, industrial products or live stock, having a market value and for which there is ready sale in the open market, title to which by appropriate transfer shall be taken in the name of the bank, which shall be secured by insurance against loss by fire with policies made payable to the bank, where no more than eighty (80) per cent. of the market value of such products shall be loaned or advanced thereon. In all such cases a margin of twenty (20) per cent. between the amount of the loan and the market value of the products shall at all times be maintained (except where products are intended for immediate shipment); and the bank shall have the right to call for additional collateral when the difference between the market value and the amount loaned shall be less than twenty (20) per cent., and in the event of the failure to comply with such demand, to immediately sell all or any part of such products in the open market and pay the amount of the loan and the expenses of sale, and the balance to the borrower; and provided that the limit herein fixed shall not apply to loans fully secured by bonds or certificates of indebtedness of the United States or of this State, or of the several counties, districts or municipalities

thereof which have been duly and regularly validated as provided by law. Liabilities arising to the makers and indorsers of checks, drafts, bills of exchange, received by the bank on deposit, cashed or purchased by it, shall not in any way be considered as borrowed money or loans.

It shall be the duty of the Superintendent of Banks to order any loan in excess of the amount herein fixed reduced to the legal limit or the excess charged to profit and loss, provided in his opinion such excess is not well secured, and if such reduction shall not be made within thirty (30) days after such notification, to proceed as in other cases provided for violation of the orders of the Superintendent.

The Senate bill passed at the Session of 1920 amended this section so as to authorize a bank to lend ten per cent. of its capital and surplus without requiring security, putting state banks on an equality with National Banks in this regard. But the House struck the amending section, leaving the Act unchanged.

There was no limit on the amount a bank could lend under the old law, but the loan if in excess of ten per cent. of the capital and surplus was required to be "amply secured by good security." This was the only restriction. No approval of the directors was required, and loans to firms and to the several members thereof could be treated as separate lines. The exceptions set out in the proviso follow in substance those in § 5200, U. S. R. S., as amended by the Acts of June 22, 1906, September 24, 1918, and October —, 1919, § 9761, U. S. Comp. Stat. Somewhat similar provisions are contained in § 108 of the New York law and § 21 of the Alabama Act.

Discussing § 5200, U. S. R. S., after which this section is modeled, the author of Pratt's Digest says:

"The general purpose of this section is obvious. It is to prohibit any bank from hazarding a large amount of its funds in loans to any one person, and to require such a distribution of the risks among a large number of persons that the failure of any one or two customers will not so seriously involve the bank as to endanger its solvency. But the transactions of the banks would be unduly hampered if this rule applied in the case of all discounts, and so an exception is made in favor of 'bills of exchange drawn against actually existing values,' and 'commercial or business paper actually owned by the person negotiating the same.' In *Second National Bank of Oswego v. Burt* (93 N. Y. 233), it was said by the New York Court of Appeals: 'The object of this provision of the currency act was to guard national banks from the hazard of loaning money in improvident amounts upon speculative and accommodation paper, but it contemplated and permitted, to an unlimited amount, the discount of paper used and required in facilitating the transfer of property and money in the transaction of the legitimate business of the country.'

"Numerous questions arise under this section which cause bank officers much perplexity. The question that should always be answered is, who is the borrower? i.e., who procured the money from the bank? The liabilities of a person to a bank as endorser, guarantor or surety should not be considered in computing the ten per cent. limit unless such person actually negotiated the loan with the bank and received the proceeds derived therefrom. * * * But it is to be remembered that the question, who is the borrower? is not

always to be determined from the positions of the parties as they appear on the paper. The borrower may be the maker, or he may be the endorser. It is the person who negotiates the paper with the bank, who procures the money upon it, that is the borrower, irrespective of whether he appears thereon as endorser or guarantor or maker." Pratt's Digest, 1917, p. 116.

"There is no restriction of law prohibiting the Comptroller of Currency from permitting a national bank having a lawfully established branch to make loans at either place, based on the total amount of capitalization and surplus of the corporation. The only restriction of law in this respect is that the aggregate loans made by the mother bank and all its branches shall not at any one time exceed the limitations of this section." (1909) 27 Op. Atty. Gen. 601.

§ 158. SEC. 14. LIABILITY OF DIRECTORS FOR ALLOWING LOANS EXCEEDING LIMIT.

The directors of any bank who shall approve or permit any loan to be made in excess of the limit herein fixed shall be personally and individually liable and responsible to the bank for such loan in the event the same should not be paid by the borrower: *Provided, however,* That any director who shall not have voted in favor of such loan may have his dissent or disapproval thereof entered upon the minutes at the meeting at which said loan is authorized, or at the next meeting held after he has discovered that such loan has been made, in which event he shall be relieved of liability therefor.

The National Bank Act, § 5239, U. S. R. S.; § 9831, U. S. Comp. Stat., provided that wherever a national banking association knowingly and wilfully violates any provision of the act, "every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." The above section is a sort of specific application of the principle of this provision.

Directors can not be made to respond to damages or to pay excessive loans, unless some injury was done to the bank or loss sustained by reason thereof. Emerson v. Gaither, 103 Md. 564, 8 L. R. A. (N. S.) 738.

§ 159. SEC. 15. LOANS ON REAL ESTATE, LIMIT OF.

No bank doing a commercial business and receiving deposits subject to check, shall lend upon real estate held as an investment, or for the purchase of real estate, or the improvement thereof, more than fifty (50) per cent. of the fair market value of such real estate; and the aggregate amount of such loans shall at no time exceed the amount of its savings and time deposits; provided that this section shall not apply to temporary loans or regular commercial transactions secured in whole or in part by

real estate, nor to any loan which shall have been made prior to the approval of this act.

This is the first time a restriction has been placed on real estate loans in Georgia. Until comparatively recently national banks were not allowed to take real estate security save on debts previously contracted, but by the Federal Reserve Act (December 23, 1913, amended September 7, 1916), U. S. Comp. Stat., § 9763, they were authorized (with certain limitations) to lend not more than 25 per cent. of their capital and surplus or one-third of their time deposits on farm lands or improved real estate, within one hundred miles of the location of the bank, the loan not to exceed 50 per cent. of the value of the property.

New York makes similar restrictions, § 108 (4), New York law.

A loan made in violation of this section is nevertheless valid and enforceable. *McCormick v. Market National Bank*, 165 U. S. 538, 41 L. Ed. 817.

§ 160. SEC. 16. Overdrafts.

Any officer or employee of any bank who shall permit any customer of the bank to overdraw his account or who shall pay any check or draft, the paying of which shall overdraw any account, unless the same shall be authorized by the board of directors, or by a committee of such board authorized to act, shall be personally and individually liable to such bank for the amount of such overdraft.

In an early case the Supreme Court of the United States held that an officer was personally liable for an overdraft allowed or permitted by him, and that even the authority of the board of directors would not relieve him. *Minor v. Mechanics' Bank*, 1 Pet. 46, 7 L. Ed. 47. But the view generally adopted in recent years is that an overdraft is a loan, an irregular and dangerous kind of loan, but a loan nevertheless, and that an officer authorized to make loans may allow overdrafts. *Morse on Banks and Banking*, §§ 357 and 358. This section is intended to limit and restrict the power of officers with respect to overdrafts to cases authorized by the directors or loan committee of the bank.

§ 161. SEC. 17. Loans Upon Collateral.

No bank shall lend more than thirty (30) per cent. of its capital and unimpaired surplus on the stock of any corporation, although such stock may be pledged to it by several separate borrowers, and where loans are made direct to the corporation, without ample security, these direct loans shall be included in such total of thirty (30) per cent. No bank shall make a loan secured by the stock of another corporation if by the making of such loan the total stock of such corporation held by it as collateral will exceed in the aggregate twenty (20) per cent. of the capital stock of such corporation.

The general plan of § 108 (3) of the New York law is followed in this section.

Where stock of an incorporated company is pledged by the owner as collateral security for the payment of a debt, the pledgee is, as a general rule, entitled to collect and receive the dividends thereon, unless this right is reserved by the pledgor at the time the pledge is made. *Guarantee Co. of North America v. East Rome Town Co.*, 96 Ga. 511.

§ 162. SEC. 18. Certificates of Deposit.

No bank shall issue any certificate of deposit except in exchange for lawful money of the United States, or for checks, drafts, or bills of exchange which are the actual equivalent of such money; [and all certificates of deposit shall be signed by an officer of the bank and countersigned by another officer or bonded employee thereof.]*

This section is intended to break up a practice, more or less common with some banks, of issuing certificates of deposit against notes discounted.

§ 163. SEC. 19. Interest to Be Charged.

Any bank may take, receive, reserve and charge on any loan or advance of money, or forbearance to enforce the collection of money, interest at not exceeding eight per cent. (8%) per annum.

As originally framed, this section authorized banks to discount or deduct interest in advance at eight per cent. The section was so framed to meet the decision of the Supreme Court in *Loganville Bank v. Forrester*, 143 Ga. 302, in which it was held that such discount was usurious under Code, § 3436. This was thought to be desirable as national banks were given the right to deduct interest in advance at the highest rate allowed by the laws of the State where they were located, § 5197, U. S. R. S.; § 9758, U. S. Comp. Stat., and the Court of Appeals held, in *Cooper, Recr., v. National Bank of Savannah*, 21 Ga. App. 356, that this section authorized national banks in Georgia to discount at eight per cent. This decision has recently been affirmed by the United States Supreme Court, 34 Sup. Ct. 58, 64 L. Ed. 69. The General Assembly, however, struck out the provision which allowed discount, leaving the section as above. As enacted, the section probably makes no change in the law, though the use of the word "reserve" may possibly authorize discount at eight per cent. To clear up the doubt and put State banks on an equality with National Banks in the matter of discount an amendment was proposed at the Session of 1920 making the section read as originally framed. But the amendment was defeated. The contract rate in Georgia is eight per cent., Code, § 3426, and banks were authorized by Code, § 2336, to charge the same rates as individuals.

*Added by Act of August 14, 1920.

§ 164. SEC. 20. Foreign and Domestic Acceptances.

A bank may accept drafts or bills of exchange drawn upon it having not more than six months' sight to run, which grow out of transactions involving the importation or exportation of goods; or which grow out of transactions involving the domestic shipment of goods, provided shipping documents conveying or securing title are attached at the time of acceptance; or which are secured at the time of acceptance by a warehouse receipt or other such document conveying or securing title covering readily marketable staples. No bank shall accept, whether in a foreign or domestic transaction, for any one person, company, firm, or corporation to an amount equal at any time in the aggregate to more than ten per cent. of its paid-up and unimpaired capital stock and surplus unless the bank is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance and no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus. *Provided, however,* That any bank which is a member of the Federal Reserve System may, when so authorized by the Federal Reserve Board, and under the regulations prescribed by it, accept such bills to an amount not exceeding one hundred per cent. of its paid-up and unimpaired capital stock and surplus, but the aggregate of acceptances growing out of domestic transactions shall in no event exceed fifty per cent. of such capital and surplus.

The Federal Reserve Act, § 9796 (5), U. S. Comp. Stat., authorized acceptances by national banks. Georgia banks were given a similar power by the Act of 1916, § 2366 (d), Park's Code, Sup. 1917. This section follows closely the terms of the Federal Reserve Act. It also makes special provision for banks which are members of the Federal Reserve System so as to put them on a parity with national banks.

§ 165. SEC. 21. Loans Upon or Purchase of Bank Stock.

No bank shall make any loan or discount on the security of the shares of its capital stock, nor be the purchaser or holder of any such shares unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and said stock so purchased or acquired shall within six (6) months of the time of its purchase be sold and disposed of at public or private sale. The limit of time, however, may be extended by the Superintendent of Banks, if in his judgment it is for the best interest of the bank that such extension be granted,

but in no case shall such time be extended longer than twelve (12) months from the time of the purchase of the same by the bank.

This section is taken from § 5201, U. S. R. S.; § 9762, U. S. Comp. Stat. The Federal Reserve Act requires the observance of this restriction by state banks as a condition of becoming members of the Federal Reserve System, § 9792 (3), U. S. Comp. Stat. Code, § 2348, prohibited banks from applying the capital stock to the purchase of their own shares. New York and other states forbid banks to make loans upon or purchase their own stock. § 108 (6), New York law; § 29, Alabama law.

"A solvent stockholder of an insolvent corporation delivered to it his shares of stock in consideration that his note held by the corporation, secured by his stock as collateral, be credited with a given amount considered by him and the president of the corporation as a fair valuation of the stock; at the time of the transaction both the stockholder and the president thought the corporation solvent, and the shares of stock were held by the corporation until it made an assignment for the benefit of creditors within a month or two thereafter. Adjudged, that the stockholder held the money or credit so received by him subject to the superior equity of the creditors of the corporation, and that a receiver subsequently appointed for the corporation could recover of the stockholder, for the benefit of creditors, the amount of such credit." *Fitzpatrick v. McGregor*, 133 Ga. 332 (2).

§ 166. SEC. 22. Unauthorized Investments.

No bank shall employ or invest its funds in the purchase or holding of the stock of any industrial, mercantile or mining corporation, or in the purchase or handling of merchandise, farm or manufactured products, except to secure a debt previously contracted in good faith, and if any such stocks, merchandise, or products are purchased to protect the bank from loss, the same shall be disposed of at public or private sale within six (6) months after receiving the same, or the same shall be charged to profit and loss and not carried as assets by the bank. The limit of time, however, may be extended by the Superintendent of Banks, if in his judgment it is for the best interest of the bank that such extension should be granted. Nothing in this section is to be construed as applying to trust companies or savings banks doing a trust or savings business.

This seems to be an original section. Even without this express prohibition banks have no power under their charters to purchase stocks. There are, however, frequent calls upon banks to take stock in local enterprises being organized to benefit the community in which the bank solicited is located. This section was framed to prevent yielding to temptation by generous and public-spirited bank officers.

§ 167. SEC. 23. Purchase of Stocks or Bonds.

No bank shall subscribe or purchase any stocks (except stock in the Federal Reserve Bank or in any State bank hereafter organized with functions applicable to its members similar in character and effect to the functions of the Federal Reserve Bank to its members, necessary to qualify for membership therein in which case the purchase of stock in said State bank shall not be made unless the purchase has first been approved by the State Superintendent of Banks and the amount of stock bought shall not exceed that permitted in the Federal Reserve Bank) or bonds, except bonds of the United States, of the State of Georgia, or of the several counties, districts, including drainage districts, or municipalities thereof, which have been duly and regularly validated as provided by law, or of the other States of the United States or, with the approval of the Superintendent of Banks, good interest-bearing bonds of foreign governments; provided that nothing herein contained shall limit or interfere with regularly authorized trust companies, doing a trust company business, advancing or lending money on syndicate underwritings, upon which such trust companies are authorized to charge such commissions, in addition to interest, as may be agreed upon by the parties, or from subscribing, purchasing or holding stocks, bonds, or other securities; *Provided*, That this section shall not apply to securities actually owned at the date of the approval of this act. *Provided further*, That any bank of this State may invest not exceeding five per centum of its capital and surplus in the stock of a corporation engaged in the business, in whole or in part, of holding, marketing or exporting cotton from the United States, or any of its dependencies, or insular possessions, to any foreign country. But no bank shall subscribe to the capital stock of more than one such corporation, and shall first receive the approval of the Superintendent of Banks. *Provided further*, That nothing contained in this section shall apply to savings banks doing only a savings business.

Alabama has a restriction upon the purchase of bank stock. § 29, Alabama act. This section is much more comprehensive. It recognizes, however, the right to invest in bonds which are of undoubted value. The proviso authorizing the purchase of the stock of an export company was inserted in view of the pendency in Congress of two bills to amend the Federal Reserve Act so as to authorize similar investments by national banks, the McLean-Platt Amendment (approved Sept. 17, 1919,) and the Edge Export Finance Act (approved Dec. 24, 1919).

§ 168. SEC. 24. Purposes for Which Banks May Hold Real Estate.

Any bank may purchase, hold and convey real estate for the following purposes only: first, such as shall be necessary for the convenient transaction of its business, the amount of which, including its furniture and fixtures, shall not exceed one-third ($\frac{1}{3}$) of the paid-in unimpaired capital and surplus; *Provided*, That the Superintendent of Banks may, upon application by any bank, in his discretion, allow a greater sum invested; second, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its business; third, such as it shall purchase at sales under judgments, decrees, or mortgage foreclosures under securities held by it; but a bank shall not bid, at any such sale, a larger amount than sufficient to satisfy its debt, costs and expenses. No real estate acquired in the cases contemplated in the second and third subsections above shall be held for a longer period than five (5) years unless the time shall be extended by the Superintendent for cause shown; *Provided*, That this section shall not apply to any banking house, furniture or fixtures actually owned at the date of the approval of this act. *Provided further*, That nothing contained in this section shall apply to savings banks doing only a savings business.

This follows in substance, § 5137, U. S. R. S.; § 9674, U. S. Comp. Stat. The limit on the value of the banking house and fixtures, however, is new. It is a wise restriction, especially since banks are now authorized with only \$15,000 capital.

§ 169. SEC. 25. Restriction of Bank's Liability.

No bank shall at any time be indebted to an amount exceeding double the amount of its capital stock actually paid in and remaining undiminished by losses or otherwise, plus the amount of the unimpaired surplus and undivided profits, except on account of the following:

1. Moneys deposited with or collected by the bank.
2. Bills of exchange or drafts drawn against money actually on deposit to the credit of the bank or due thereto.
3. Liabilities to the stockholders of the bank or dividends and reserve profits.
4. Commercial paper re-discounted.
5. Acceptances as herein authorized.
6. Liabilities incurred by the bank on account of the indorse-

ment of checks, drafts and bills of exchange received by the bank on deposit, cashed or purchased by it, and indorsed by the bank.

Provided, however, That in case of temporary emergency, or to pay its depositors, temporary loans, in excess of the amount hereinabove fixed, may be made, when approved in advance by the Superintendent of Banks.

This section is based upon § 5202, U. S. R. S.; § 9764, U. S. Comp. Stat., as amended by the Federal Reserve Act and the Act of September 7, 1916, the items not included in estimating a bank's liability being largely the same. The proviso is new.

§ 170. SEC. 26. Purchase of Bank's Obligations.

No bank, nor any of its directors, officers, agents or employees shall directly or indirectly purchase or be interested in the purchase of any promissory note, certificate of deposit, or other evidence of debt issued by it, for a less sum than shall appear on the face thereof to be due thereon: *Provided*, That a bank may discount its unmatured obligations at not more than the legal rate, which obligations shall be cancelled and satisfied forthwith.

Under an old statute (Act, 1832, Cobb, 101), codified as Code, § 2342, banks were required to pay specie for their bills, notes, drafts or other obligations when due; to receive their bills, notes, certificates of deposit or other evidences of debt in payment of debts due them; and to receive their own bills at par. By § 207, Park's Penal Code, it was made a crime for an officer to purchase the bank's obligations at a discount. This section is intended to cover both these sections, the penal section being reenacted also as § 215.

§ 171. SEC. 27. Reserve.

Every bank whose deposits are subject to check shall at all times maintain a reserve of fifteen (15) per cent. of the amount of its demand deposits, and five (5) per cent. of the amount of its savings and time deposits. Savings banks and trust companies whose deposits are not subject to check without notice shall maintain a reserve of five (5) per cent. of the amount of their deposits. Such reserve shall consist of lawful money of the United States, gold certificates, silver certificates, Federal Reserve, or national bank notes, in the office and vaults of the bank, and of moneys on deposit subject to call with other banks or bankers, such banks or bankers to be approved by the Superintendent of Banks: [provided that the reserve against savings and time deposits may be invested in bonds of the United States or of this State at the market value thereof;]* *Provided*, That any bank

which is a member of the Federal Reserve System may in lieu of the reserve herein required keep and maintain such reserve as is required under the acts of congress relating to Federal Reserve Banks. Demand deposits within the meaning of this section shall comprise all deposits payable within thirty days, and time deposits shall comprise all deposits payable after thirty days, and all savings accounts and certificates of deposit which are subject to not less than thirty days' notice before payment. [And provided that a bank shall have the right to pay checks drawn upon it when presented by any bank, banker, trust company, or agent thereof, either in money or in exchange, drawn on its approved reserve agents, and to charge for such exchange not exceeding one-eighth of one (1) per cent. of the aggregate amount of the checks so presented and paid.]*

By Code, § 2276, banks were required to maintain a reserve of 25 per cent. of their demand deposits, but the market value of stocks and bonds owned by the bank could be treated as reserve. The Act of 1918 (Ga. Laws, 1918, p. 134) authorized member banks to conform to the requirements of the Federal Reserve System. This section follows the Federal Reserve Act, § 9801, U. S. Comp. Stat., as amended, and reenacts in substance the Act of 1918.

The original proviso is intended to relieve the Georgia banks which are members of the Federal Reserve System from the necessity of maintaining the reserve required by this act and the reserve required of members of the system in the event there should be any difference in the two, and to put such member banks on a parity with national banks.

Alabama also requires a fifteen per cent. reserve, three-fifths of which may consist of demand deposits with other banks. § 19, Alabama act.

§ 172. SEC. 28. Reserve Not Maintained.

Whenever the reserve of any bank shall fall below the amount of fifteen (15) per cent. of its demand deposits and five (5) per cent. of its savings and time deposits, and whenever the reserve of any savings bank or trust company whose deposits are not subject to check shall be below five (5) per cent. of its deposits, such bank, savings bank or trust company shall not increase its liabilities by making any new loans or discounts otherwise than by discounting or purchasing bills of exchange at sight, nor shall any dividend be declared out of the profits of such bank, savings bank, or trust company, until the required proportion between the aggregate amount of its deposits and the amount to be held as a reserve has been restored. The Superintendent of Banks may notify any bank, savings bank or trust company, whose reserve

*Both these provisos added by Act of August 14, 1920.

shall be below the amount required to be kept on hand, to make good such reserve; and if such bank, savings bank or trust company shall fail within thirty (30) days thereafter to make good its reserve, the Superintendent of Banks may take charge of the business and assets of said bank, savings bank or trust company, as in other cases herein provided.

This is practically identical with § 5191, U. S. R. S.; § 9746, U. S Comp. Stat.

§ 173. SEC. 29. Dividends and Surplus.

The directors of any bank may, annually, semiannually, or quarterly, declare a dividend of so much of the net profits of the bank as they may deem expedient; but such bank shall, before the declaration of any dividend, carry twenty-five (25) per cent. of its profits earned since its last preceding dividend to its surplus until the surplus shall amount to twenty (20) per cent. of its capital. Each bank shall report to the Superintendent of Banks, within ten (10) days after declaring and at least ten (10) days before paying any dividend, the amount of such dividend and the amount of net earnings in excess of the dividend and amount carried to the surplus. Such report shall be attested by the oath of the president or cashier of the bank.

This section follows § 5199, U. S. R. S.; § 9760, U. S. Comp. Stat., which requires the setting aside of ten per cent. of the earnings until a surplus of twenty per cent. is accumulated.

"The natural increase of the property belongs to the tenant for life. Any extraordinary accumulation of the corpus—such as issue of new stock upon the share of an incorporated or joint-stock company—attaches to the corpus and goes with it to the remainderman." Code, § 3667.

§ 174. SEC. 30. Unearned Dividends Prohibited.

No bank shall withdraw or permit to be withdrawn either in the form of dividends or otherwise any portion of its capital nor reduce its surplus below twenty (20) per cent. of its capital. If losses have been sustained at any time by such bank equal to or exceeding its undivided profits then on hand, no dividend shall be declared, and no dividends shall ever be declared by any bank to an amount greater than its undivided profits then on hand, deducting therefrom its losses and bad debts. All debts due to any bank on which interest is past due and unpaid for a period of twelve (12) months, unless the same are well

secured or in process of collection, shall be considered "bad debts" within the meaning of this section.

This section is in the language of § 5204, U. S. R. S.; § 9766, U. S. Comp. Stat. The Federal Reserve Act prescribes as one of the conditions under which State banks may become members of the Federal Reserve System that they be required to conform to this section of the Revised Statutes. § 9792 (3), U. S. Comp. Stat.

Code, §§ 2348 and 2225 (a) prohibited the declaration of dividends except from net profits, and § 208, Penal Code, made the payment of such dividends a misdemeanor.

See notes to § 217.

§ 175. SEC. 31. Dividend, How Declared and When Losses Reduce Surplus.

Any losses sustained by any bank in excess of its undivided profits may be charged up to its surplus account; *Provided*, That its surplus shall thereafter be reimbursed from its earnings, and no dividend shall be declared or paid by any such bank in excess of one-half ($\frac{1}{2}$) of its net earnings until its surplus shall be fully restored to its former amount.

This is an original section, its purpose being to require the restoration of impaired surplus.

§ 176. SEC. 32. Calculation of Profits.

Interest unpaid, although due or accrued on debts owing to the bank, shall not be included in the calculation of its profits previous to a dividend, unless such interest be accrued upon loan secured by collaterals as provided for by this act. The undivided profits from which alone a dividend can be made, shall be ascertained by charging in the account of profit and loss and deducting from the actual profits:

1. All expenses paid or incurred, both ordinary and extraordinary, including taxes, attending the management of the affairs of the bank, and the transaction of its business.

2. The interest paid, or then due and accrued, on debts owing by it.

3. All losses sustained by it. In the computation of such losses, there shall be included all debts owing to the bank which shall have been due, without suit for twelve (12) months, and upon which no interest shall have been paid during that period, except such debts as in the opinion of the Superintendent are well secured. There shall also be included in such computation all debts due the bank on which judgment shall have been

recovered, which judgment shall have remained for more than one (1) year unsatisfied, and on which no interest shall have been paid during that period.

This is taken substantially from § 116 of the New York law.

§ 177. SEC. 33. Lien Against Bank for Collaterals.

When any bank is indebted to any other party and shall deposit with such party any commercial paper or papers as collateral for its debt, and such collateral shall be afterwards sent back to the bank in order that it may be collected and the funds remitted by the bank to the creditor, the holder of the *bona fide* receipt of the bank for such paper to be so collected, shall, after any such collections are made, but not paid over, have a lien against the assets of the bank to the extent of such funds as have been actually collected by the bank, and such lien shall rank with other liens according to date and shall attach from the date of the collection of any such fund by such bank.

This is a reenactment of Code, § 2354 (Acts 1905, p. 100). The act was held to be constitutional in *Collins v. American Exchange National Bank*, 147 Ga. 273.

§ 178. SEC. 34. Lien on Banks' Assets When Checks Are Not Remitted.

When any bank, or any officer, clerk, or agent thereof, receives by mail, express or otherwise, a check, bill of exchange order to remit note, or draft for collection, with request that remittance be made therefor, the charging of such item to the account of the drawer, acceptor, indorser, or maker thereof or collecting any such item from any bank or other party, and failing to remit therefor, or the nonpayment of a check sent in payment therefor, shall create a lien in favor of the owner of such item on the assets of such bank making the collection, and such lien shall rank with other liens, according to date, and shall attach from the date of the charge, entry or collection of any such funds.

In *Ober & Sons Co. v. Cochran*, 118 Ga. 396, it was held that where a note was sent to a bank for collection with instructions to remit the proceeds, but the bank violated instructions and used the money in its own business, upon the insolvency of the bank no trust resulted in favor of the owner of the note upon the assets of the bank in the hands of a receiver. Similar rulings were made in *Citizens' National Bank v. Haynes*, 144 Ga. 490, and in *U. S. National bank v. Glandon*, 146 Ga. 786. It was to meet these cases that this section was inserted.

§ 179. SEC. 35. Due Diligence on Part of Bank in Collecting.

When a check, draft, note, or other negotiable instrument is deposited in a bank for credit, or for collection, it shall be considered due diligence on the part of the bank in the collection of such check, draft, note or other negotiable instrument so deposited, to forward and route the same without delay in the usual commercial way, according to the regular course of business of banks, and the maker, indorser, guarantor, or surety of any check, draft note or other negotiable instrument so deposited shall be liable to the bank until actual final payment is received; and when a bank receives for collection any check draft, note, or other negotiable instrument and forwards the same for collection as herein provided, it shall be liable only after actual final payment is received by it, except in case of want of due diligence on its part as aforesaid.

The courts of the country have divided with respect to the liability of a collecting bank. By some it has been held that a collecting bank is liable for the defaults of its agents and correspondents. Others have taken the view, more in keeping with modern business methods, that the forwarding bank is only liable for its own neglect and defaults where it exercises proper care in the selection of correspondents and means of collection, the correspondents and agents being regarded as the agents of the depositor rather than of the collecting bank. The Supreme Court of Georgia in *Bailie v. Augusta Savings Bank*, 95 Ga. 277, adopted the first of these theories, Code, § 2362, codified from this decision being as follows:

"In the absence of a contract, express or implied, to the contrary, a bank taking paper for collection is liable for the defaults of its agents and correspondents to whom the paper has been intrusted for collection."

This section in effect overrules the *Bailie* case and adopts the second of the above given theories.

§ 180. SEC. 36. Forwarding Check Direct to Payor.

Any bank, or banker, doing business in this State, receiving for collection or deposit, any check, note, or other negotiable instrument, drawn upon or payable at any other bank located in another city or town whether within or without this State may forward such instrument for collection directly to the bank on which it is drawn or at which it is made payable and such method of forwarding direct to the payor shall be deemed due diligence and the failure of any such payor bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor: *Provided, however,* Such forwarding bank shall have used due

diligence in other respects in connection with the collection of such instrument.

Under the rule generally adopted by the courts a bank forwarding a check or other item direct to the drawee or payor is guilty of negligence and responsible for any loss which may result. The custom among banks, however, has sanctioned the practice of forwarding items direct to the payor. In Georgia where there are many small towns in which there is only one bank, this is the only practical method of collection. This section legalizes the custom generally prevailing. A similar statute has been adopted in Alabama, Louisiana, Montana, and possibly other States.

§ 181. SEC. 37. Certifying Checks.

No check shall be certified except by the president, a vice-president, cashier, or an assistant cashier of a bank. It shall be unlawful to certify any check, draft, or order upon the bank unless the drawer of such check, draft, or order has on deposit with the bank, at the time such check, draft, or order is certified, an amount of money equal to the amount specified in such check, draft or order. Such certification shall be entered on the face of such check, draft or order, and the check, draft or order so certified shall be charged against the drawer's account immediately. Any check certified by a proper officer shall be a good and valid obligation against the bank; but the act of any officer in violation of this section shall subject him to the penalties provided in this act.

This reenacts in substance Code, § 2301, which in turn was copied from § 5208, U. S. R. S.; § 9770 U. S. Comp. Stat. § 5208 has been amended by the Act of Sept. 26, 1918, § 9770, U. S. Comp. Stat., so as to apply to Federal Reserve Banks and member banks.

It has been the practice for tellers of some banks to certify checks, but the courts have generally held that a teller has no implied power to certify. This section limits the power to the proper officers.

§ 182. SEC. 38. Membership in Federal Reserve Bank.

Banks are authorized and empowered to subscribe for stock and become members of the Federal Reserve Bank of the district to which they properly may be assigned by the Federal Reserve Board, in accordance with the acts of congress regulating Federal Reserve Banks, and any bank becoming such member shall be authorized to conform to the requirements and regulations of such Federal Reserve Bank, and of the Federal Reserve Board.

The Federal Reserve Act, December 23, 1913, as amended by the Act of June 21, 1917, § 9792, U. S. Comp. Stat., makes full provision

for the membership of State banks in the Federal Reserve System, and prescribed the terms and conditions of such membership. By the Act of 1915, p. 33, § 2366 (a), Park's Code, Sup. 1917, banks incorporated under the laws of Georgia were authorized to subscribe for stock in and become members of the Federal Reserve Bank of this district. This section is similar though somewhat broader in its terms than Code, § 2366 (a). Similar statutes have been adopted in most of the States.

§ 183. SEC. 39. Payment of Deposits in Two Names.

When a deposit has been made, or shall hereafter be made, in any bank transacting business in this State in the names of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of said persons, whether the other be living or not; and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made.

In the absence of a statute, the courts generally have held that a deposit in the name of two parties belongs, presumptively, to them equally, and upon the death of one of them his half interest passes to his personal representative. This section is intended to give the bank clear legal authority for the payment of such a deposit to the survivor of the two joint depositors. Similar statutes have been enacted in thirty-two States.

§ 184. SEC. 40. Check of Deceased or Bankrupt or Insane Depositor.

The death or bankruptcy of a depositor unknown to the bank shall not revoke a check given by him, and a bank shall be authorized to pay through regular channels a check regularly drawn upon it by a depositor therein, notwithstanding the death or bankruptcy of such depositor unknown to the bank at the time of such payment. A bank paying the check of an insane depositor in good faith and without notice or knowledge of the insanity of such depositor shall be protected in so doing and may lawfully charge such check to the account of such depositor.

The rule adopted by the courts generally is that death revokes a check and that a bank paying a check after the death of the drawer, although in good faith and without notice of his death, is not protected. This is also the rule with respect to the bankruptcy of the drawer. An insane person not being able to contract, (Code, § 4237,) could not legally withdraw a deposit by check, and a bank paying such check, though the fact of the drawer's insanity was unknown to it, was not protected in so doing. *American Tr. & Bkg. Co. v. Boone*, 102 Ga. 202. These rules which were manifestly unjust to the bank are intended to be corrected by this section.

§ 185. SEC. 41. Deposits by Minors.

A minor shall be allowed to deposit money in bank in his own name, and the money so deposited shall not be subject to the control of his parent, guardian, or trustee, but may be drawn or checked out by the minor depositing the same as though he were of full age.

Under the Code, the contracts of an infant, i. e., one under twenty-one years of age, are voidable by him except in a few cases. Code, § 4233. As the opening of a bank account and checking thereon is a contract, a bank accepting an account from a minor did so at considerable risk. This section provides another exception to the general rule, making voidable the contracts of an infant.

§ 186. SEC. 42. Deposit by Agent, Trustee, or Other Fiduciary.

Whenever any agent, administrator, executor, guardian, trustee, either express or implied, or other fiduciary whether *bona fide* or *mala fide* shall deposit any money in any bank to his credit as an individual or as such agent, trustee, or other fiduciary, whether the name of the person or corporation for whom he is acting or purporting to act be given or not, such bank shall be authorized to pay the amount of such deposit or any part thereof, upon the check of such agent, administrator, executor, guardian, trustee, or other fiduciary, signed with the name in which such deposit was entered, without being accountable in any way to the principal, *cestui que trust*, or other person or corporation who may be entitled to or interested in the amount so deposited.

Nothing herein contained shall prevent the person or corporation claiming the beneficial interest in or to any deposit in any bank from resorting to the courts to subject such deposit, provided such action is brought and served before such deposit is paid out, and to any action brought for this purpose both the bank and the depositor shall be necessary parties defendant.

This section puts in the form of a statute a rule established by the decisions of the Supreme Court in *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333; *America Tr. & Bkg. Co. v. Boone*, 102 Ga. 202, and other cases. It should be remembered, however, that these cases also hold that a bank actively aiding a trustee or agent in misappropriating a trust fund deposited by him, and especially if it participates in the misappropriation and receives the fruits of it by obtaining the payment of a debt due it by the trustee or agent individually is liable to the true owner for the amount so wrongfully appropriated to its own uses. While this section protects a bank acting in good faith, it is not intended to shield a bank which knowingly participates in a misappropriation by an agent, trustee or other fiduciary.

§ 187. SEC. 43. Payment of Deposits in Trust.

Whenever any deposits shall be made in any bank by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same, or any part thereof, together with the dividends or interest thereon may be paid to the person for whom said deposit was made.

Similar statutes have been enacted in twenty-four States. The section is intended to protect the bank in paying to the beneficial owner funds deposited for his benefit upon the death of the trustee.

§ 188. SEC. 44. Forged or Raised Checks.

No bank which in good faith has paid, and charged to the account of a depositor, any money on a forged or raised check issued in the name of the depositor shall be liable to said depositor for the amount paid thereon, unless, (1) within sixty (60) days after the return to the depositor of the voucher representing such payment, the depositor shall notify the bank that the check so paid was forged or raised, or, (2) in the event the voucher has not been returned to the depositor, within sixty days after notice shall have been given by the bank to the depositor to have his pass book balanced and to call for his vouchers. The notice herein referred to may be given by mail to said depositor at his last known address.

The well-known rule is that a bank paying a forged or raised check of its depositor can not charge the amount to his account, but must itself bear the loss, provided the depositor has been free from blame and has not contributed to the forgery by his own negligence. *Ga. R. R. & Bkg. Co. v. Love, etc., Society*, 85 Ga. 293; *Atlanta National Bank v. Burke*, 81 Ga. 597; *Woods v. Colony Bank*, 114 Ga. 683. The purpose of this section is to fix a limit of time within which the depositor must give notice of the forgery or alteration after his account has been balanced and the opportunity for detection has been afforded him. Similar statutes have been enacted in twenty-two States, the period of time varying from thirty days to one year after the return of the vouchers.

§ 189. SEC. 45. List of Stockholders to Be Sent to Superintendent of Banks.

The president and cashier of every bank shall cause to be kept at all times, in the office where its business is transacted, a full and correct list of the names and residences of all the stockholders in the bank, with the number of shares held by each, respec-

tively. Such list shall be subject to the inspection of all stockholders of the bank during business hours of each day in which business may be legally transacted. A copy of such list, verified by oath of such president or cashier, shall be transmitted on the first Monday in July of each year, to the Superintendent of Banks, such copy list also to be subject to inspection as hereinabove provided.

This is a reenactment of Code, § 2307, codified from the Bank Bureau Act, and modelled after § 5210, U. S. R. S.; § 9773, U. S. Comp. Stat.

§ 190. SEC. 46. Transfers After or in Contemplation of Insolvency.

All transfers of notes, bonds, bills of exchange, or other evidence of debt owing to any bank, or deposits to its credit; all assignments, mortgages, conveyances or liens; all judgments or decrees suffered or permitted against it; all deposits of money, bills or other value things for its use, or for the use of its stockholders or creditors; and all payments of money, either after insolvency or in contemplation of insolvency, with a view to prevent application of its assets in the manner prescribed in this act, or with a view to the preference of one creditor over another, shall be null and void, provided such acts enumerated were committed within three months prior to the failure of such bank.

Conveyances and transfers after or in contemplation of insolvency were declared fraudulent and void by Code, § 2360. This section is somewhat broader and more definite in its terms, following in substance the Bankruptcy Act, § 67.

"Where a bank, after cashing several checks drawn upon another bank, received from the drawee bank a check covering the amounts paid out, and then presented the check thus given for payment, and received therefor, instead of cash, a promissory note payable to the drawee bank, which was insolvent at the time and closed its doors two days later, the transaction was not necessarily invalid, but the title to the note passed to the purchaser thereof, where there was no fraudulent intent upon its part and it took without notice of the insolvency of the other bank. The check which it surrendered was a valuable consideration for the note received, and was not, as a matter of law, the same as a preexisting debt, so as to make the transfer of the note a preference by the insolvent bank." Thomas *v.* Crawford, 147 Ga. 437 (1).

"The provisions of the Code, § 2360, which prohibits all conveyances and assignments by a bank in contemplation of insolvency or after insolvency, except for the benefit of all creditors and stockholders, is intended to prevent preferences for an antecedent debt, and has no application against an innocent assignee for value, without knowledge of such condition of the bank. *Booth v. Atlanta Clearing House*, 132 Ga. 100 (63 S. E. 907); *Hightower v. Mustian*, 8 Ga. 506; *Clarke v. Ingram*, 107 Ga. 565, 578 (33 S. E. 802); *Toomey Bros. v. Citizens' and Southern Bank*, 19 Ga. App. 271.

§ 191. SEC. 47. Savings Deposits; Regulations; Limitations.

Sums deposited with any savings bank and savings deposits taken by any bank doing both a commercial and savings bank business, together with interest credited thereto, shall be repaid to the depositors, respectively, or to their legal representatives, after demand, in such manner and at such times and after such previous notice and under such regulations as the board of directors of such bank shall prescribe, and interest thereon shall be credited at such times and at such rates and under such regulations as may be prescribed by said board of directors. The rules and regulations adopted by the board of directors governing deposits shall be printed in the pass books or other evidences of deposit furnished by such bank, and shall be evidence between the bank and the depositors holding the same of the terms upon which the deposits therein acknowledged are made. A bank receiving savings deposits may limit the aggregate amount which any one person, firm, association or corporation, may deposit to such sum as it may deem expedient to receive, and may in its discretion refuse to receive any deposit, and may also at any time return all or any part of any deposit with the interest accrued thereon, according to the rules and regulations adopted by said bank. Where a bank does both a commercial and savings business separate records shall be kept of its savings deposits.

This section follows rather closely § 248 of the New York act. The right of a bank accepting savings accounts to prescribe reasonable rules binding on the depositor has been upheld in *Langdale v. Citizens' Bank*, 121 Ga. 105, and *Wilson v. Citizens & Southern Bank*, 23 Ga. App. 654. The rule in question in these cases and which was held to be a reasonable regulation, was: "Every effort will be made to protect depositors against fraud, but payment made to a person presenting the pass book shall be good and valid on account of the owner unless the pass book has been lost and notice in writing given to this bank before such payment is made."

§ 192. SEC. 48. Payment of Deposit of Deceased Depositor.

Upon the death of any person, intestate, having a deposit in a bank of not more than \$100, such bank shall be authorized to pay over such deposit (a) to the husband or wife of the depositor, (b) if no husband or wife, to the children, (c) if no children, to the father if living, if not to the mother of the depositor, (d) if no children or parent, then to the brothers and sisters of the depositor. The receipt of such person or persons shall be a full and final acquittance to the bank and relieve it of all liability to

the estate of said deceased depositor or the representative thereof should one be appointed.

This section follows in general plan Code, §§ 3134-36, authorizing certain corporations to pay over to the widow and children without administration, wages due a deceased employee. The provision will be quite valuable in that large class of small accounts where the depositor has no other property and the cost of administration is out of proportion to the amount of the deposit.

Alabama, since the passage of this act, has adopted a statute similar to the above section authorizing the payment to the widow or heirs of a depositor of deposits of \$1,000.00 or less.

ARTICLE XX.

Crimes and Misdemeanors.

§ 193. SECTION 1. Giving Notice of Examination.

Any Superintendent of Banks, Assistant Superintendent, Examiner, or office assistant, who shall, previous to the visitation of any bank for regular examination, give notice or information, directly or indirectly, to any officer, director, agent, representative, or employee of such bank, as to the time when the same will be visited for examination, shall be guilty of a misdemeanor. *Provided*, That this section shall not apply to special examinations made at the request of any bank or on motion of the superintendent.

This is taken from § 35 of the Alabama law.

§ 194. SEC. 2. Disclosing Condition of Bank.

Any Superintendent of Banks, Assistant Superintendent, Examiner, or office assistant, who shall knowingly and wilfully disclose the condition and affairs of any bank ascertained by examination, except to the extent authorized by law, shall be guilty of a misdemeanor.

This follows § 36 of the Alabama law. The Federal Reserve Act, as amended, § 9833, U. S. Comp. Stat., makes it a misdemeanor for an examiner to disclose the names of borrowers or the collateral for loans of a member bank. This section covers these as well as any other disclosures of the affairs of a bank.

§ 195. SEC. 3. False Report of Examination by Examiner.

Any Superintendent of Banks, or Examiner, who shall make report as to the result of any examination made by him, which

is knowingly and wilfully false, shall be punished by confinement and labor in the penitentiary for not less than one (1) year nor more than five (5) years.

This follows § 37 of the Alabama law.

§ 196. SEC. 4. Neglect and Misconduct of Superintendent, Examiner, or Clerk.

Any Superintendent of Banks, Assistant Superintendent, Examiner, or office assistant, who shall wilfully neglect to perform any duties required by him by law or who shall knowingly and wilfully make any false statement of or concerning any bank, or who shall be guilty of any misconduct or corruption in office, shall be punished as for a misdemeanor, and upon conviction, shall be removed from office by the Governor.

This reenacts § 622, Penal Code, codified from the Bank Bureau Act.

§ 197. SEC. 5. False Expense Account.

Any Superintendent of Banks, Assistant Superintendent or Examiner who shall knowingly and wilfully render a false account of expenses paid by him in the discharge of his duties, shall be guilty of a misdemeanor.

This is doubtless covered by the preceding section, but it was thought well to cover false expense accounts in terms.

§ 198. SEC. 6. Loans or Gratuities to Superintendent or Examiners.

No bank, nor any officer, director, or employee thereof shall make any loan, or grant any gratuity to the Superintendent of Banks, the Assistant Superintendent or any bank examiner; nor shall the Superintendent of Banks, the Assistant Superintendent, or any Examiner, accept any loan or gratuity of any kind from any bank, or from any officer, director or employee thereof, nor accept any employment from, or perform any service for compensation for, any bank, or for any officer, director or employee thereof.

Any bank officer, director or employee violating any of the provisions of this section shall be guilty of a misdemeanor. Any Superintendent of Banks, Assistant Superintendent or Bank Examiner violating any of the provisions hereof shall be guilty of

a misdemeanor and shall forfeit his office and be thereafter disqualified from holding office in the Department of Banking of this State.

This section is taken from the Federal Reserve Act, as amended by the Acts of June 21, 1917, and September 26, 1918, § 9833, U. S. Comp. Stat.

§ 199. SEC. 7. Opening Bank Without Permit.

Any person who shall hereafter transact any business as an officer, director, agent, or representative of any bank hereafter incorporated, before such bank is authorized to transact business as a bank by the permit of the Superintendent of Banks, shall be guilty of a misdemeanor.

This section is taken from § 38 of the Alabama law.

§ 200. SEC. 8. False Statement of Condition.

Any person who knowingly and wilfully verifies by oath or affirmation any false report of the condition of any bank, made to the Superintendent of Banks, on the call of the Superintendent for such report, or any false report or certificate of any other matter or thing required by this act to be reported, shall be punished by confinement and labor in the penitentiary for not less than one (1) year nor longer than five (5) years.

This section follows § 665 (3) of the New York act, and § 39 of the Alabama act.

§ 201. SEC. 9. False Oath.

Any person who wilfully and corruptly swears or affirms falsely when being examined under oath by the Superintendent of Banks, or any Examiner appointed by him, in regard to any material matter or thing, shall be guilty of false swearing, and upon conviction shall be punished by confinement and labor in the penitentiary for not less than one (1) year nor more than five (5) years.

This section follows § 40 of the Alabama act. Doubtless § 261, P. C., making penal false swearing wherever an oath is lawfully administered would have been sufficient to cover the cases provided for by this section.

§ 202. SEC. 10. False Entries.

Any officer, agent, clerk, or employee of any bank who makes any false entry in any book, report, or statement of the bank, or

who omits or concurs in omitting to make any material entry in its books or accounts with intent in either case to injure or defraud the bank, or any other company, firm, or person, or to deceive any officer of the bank, or the Superintendent of Banks, or any Examiner, and every person who with like intent aids or abets any officer, director, clerk, agent, or employee, in making any false entry, report, or statement, or omitting to make any material entry on its books and accounts, shall be punished by imprisonment and labor in the penitentiary for not less than one (1) year nor more than ten (10) years.

This section is modelled after § 5209, U. S. R. S.; § 9772, U. S. Comp. Stat. The Federal Reserve Act extends the provisions of § 5209 to State banks on their becoming members of the Federal Reserve System, § 9792 U. S. Comp. Stat.

§ 203. SEC. 11. Refusing to Make Statements.

Any officer, director, agent, clerk, or employee who refuses, or wilfully and intentionally neglects to make any report or statement of or concerning the bank of which he is such officer, director, clerk, or employee, where such report or statement is called for by the Superintendent of Banks, shall be guilty of a misdemeanor.

This follows § 46 of the Alabama law.

§ 204. SEC. 12. Bank Officers Violating the Charter.

Any president, director, or other officer of any bank who shall violate or be concerned in violating any provision of the charter of said bank, shall be punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than five (5) years.

This reenacts § 202, Penal Code, which with the following section were contained in the Penal Code of 1833 (Cobb's Digest 797) and have been brought forward in each succeeding Penal Code.

§ 205. SEC. 13. Presumption Against Such Officers.

Every president, director or other officer of any chartered bank in this State shall be deemed to possess such a knowledge of the affairs of the banks as to enable him to determine whether any act, proceeding, or omission is a violation of the charter. And every president and director, who shall be present at a meeting when such violation shall occur, shall be deemed to have con-

curred therein, unless he shall at the time cause, or in writing require, his dissent therefrom to be entered at large on the minutes of the board. And every president and director not present at any meeting when such violation shall take place, shall nevertheless be deemed to have concurred therein, if the facts constituting such violation appear on the books of the bank, and he remain president or director for three (3) months thereafter, and do not within that time, unless prevented by illness or other providential cause, cause or in writing require, his dissent from such illegal proceedings to be entered at large on the minutes of the board.

This reenacts § 203, Penal Code.

§ 206. SEC. 14. Falsely Representing Capital Stock.

Any officer, director, agent, clerk, or employee who knowingly by letter-heads, newspaper advertisements, sign, circulars, or otherwise represents capital stock of any bank to be in excess of the capital actually paid in, or who knowingly makes or concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement therein which is false, or who knowingly omits or concurs in omitting any statement required by law to be contained therein, shall be punished by imprisonment and labor in the penitentiary for not less than one (1) year nor more than five (5) years.

This is taken from § 46, of the Alabama law.

§ 207. SEC. 15. Falsely Advertising That Deposits Are Insured.

Any officer, director, agent, or employee of any bank who shall advertise by any office sign, or upon any letter-head, bill-head, blank note, receipt, certificate, circular, or on any written or printed paper that the deposits in said bank are insured or are guaranteed, unless such deposits are in fact insured or guaranteed, shall be guilty of a misdemeanor.

The deposit guarantee laws of a few of the States led some of the banks to insure their deposits. Some of this insurance was of no value, the insuring company being without responsibility. It was to prevent such fraudulent insurance that this section was framed.

§ 208. SEC. 16. Concealing Loans.

Any officer, director, clerk, or other employee of any bank who intentionally conceals from the directors of such bank, or from the committee to whom the directors have delegated authority to pass on loans and discounts, any discount or loan made for and in behalf of said bank, or the purchase or sale of any note, bill of exchange or security, shall be guilty of a misdemeanor.

This is taken from § 44 of the Alabama law.

§ 209. SEC. 17. Commissions to Officers on Loans.

Any officer, director, agent, teller, clerk, or other employee of any bank who asks or receives, or covenants or agrees to receive, any commission, emolument, gratuity, or reward, or any promise of any commission, emolument, gratuity, or reward, or any money or property or thing of value, or of personal advantage, for procuring or endeavoring to procure for any person, firm, or corporation, any loan from, or the purchase or discount of, any paper, note, draft, check, or bill of exchange, by any such bank, shall be guilty of a misdemeanor.

This is taken from § 45 of the Alabama law. The Federal Reserve Act as amended, § 9833, U. S. Comp. Stat., contains a similar provision applicable to officers, directors and employees of member banks.

§ 210. SEC. 18. Misappropriation by Officers, Directors, Agents, or Employees.

Any officer, director, agent, clerk or employee of any bank who knowingly and with intent to defraud, receives or possesses himself of any of its money or property, or who with intent to defraud, omits to make on its books of account a full and true entry of any money or property of the bank received or possessed by him, or who with such intent causes such omission, shall be punished by imprisonment and labor in the penitentiary for not less than one (1) year nor more than five (5) years.

The Acts enumerated in this section are included in the section providing a penalty for embezzlement in the National Bank Act, § 5209, U. S. R. S.; § 9792, U. S. Comp. Stat., which by amendment has been extended so as to include all members of the Federal Reserve System See § 212.

§ 211. SEC. 19. Overdrafts of Officers, Agents, and Employees.

Any officer, agent, director, clerk, teller, or other employee of any bank who wilfully and knowingly, and without authority from the board of directors, overdraws his account with such bank, and thereby obtains moneys or funds of any such bank, shall be guilty of a misdemeanor.

This section is taken from § 45 of the Alabama law.

§ 212. SEC. 20. Embezzlement.

Any officer, director, agent, clerk, or employee of any bank who embezzles, abstracts, or wilfully misappropriates, any of the moneys, funds, securities or credits of the bank or who issues or puts forth any certificate of deposit, draws any draft or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, decree or execution or who makes use of the name of the bank in any manner, with intent in either case to injure or defraud the bank, or any person, firm, or corporation, or to deceive any officer of the bank, or the Superintendent of Banks, or any Examiner, or any person who with like intent aids or abets any such officer, director, agent, clerk, or employee in any violation of this section, shall be punished by imprisonment and labor in the penitentiary for not less than one (1) year nor more than ten (10) years.

See § 210.

This section is taken from § 5209, U. S. R. S.; § 9772, U. S. Comp. Stat. § 186, Penal Code, made it a felony for an officer or employee to "embezzle, steal, secrete, or fraudulently take and carry away" any money or property of a bank or other corporation. This section is considerably broader and more comprehensive, and includes wilful misappropriation as well as embezzlement. By the Act of September 26, 1918, § 5209, U. S. R. S., is made applicable to officers, directors, agents and employees of Federal Reserve Banks and of member banks as well as to national banking associations. § 9792, U. S. Comp. Stat. The language employed is substantially taken from § 46 of the Alabama act.

Accessory, one may be, who is not an employee of corporation. 118/799 (3) (45 S. E. 614).

Indictment substantially in language of section, sufficient. 10 App. 21, 23 (72 S. E. 516). Indictment need not allege accused was employed "in the house of, or place of business of the corporation"; nor from whom accused received the money; nor character of false and fraudulent reports rendered. 114/25 (1) (40 S. E. 13). Indictment sufficiently alleges by whom the property embezzled was intrusted to the defendant, when it states that he was president of corporation, having the general management of its business and the control of its funds, and having in his trust, custody and control large sums of money belonging to it, etc. 76/551 (13).

Intention to restore money not prevent act from being embezzlement, where money of principal is knowingly used by agent for his own private benefit, and in violation of duty to principal. 11 App. 427 (1) (75 S. E. 512).

§ 213. SEC. 21. Borrowing by Officers, Directors, and Employees.

Any officer, agent, or employee of any bank who shall use or borrow for himself, directly or indirectly, or for any firm or partnership of which he is a member, any money or other property belonging to any bank of which he is an officer, agent, or employee, without such use or loan being approved by a majority of the directors or by the members of a committee of the board of directors authorized to act, as provided by Article XIX, § 11, of this act, or who shall in like manner procure any such loan which is not secured in the manner provided by Article XIX, § 12, of this act, shall be guilty of a misdemeanor.

This reenacts in substance § 210, Penal Code, modifying it somewhat so as to conform to the requirements of §§ 155 and 156 of the act.

§ 214. SEC. 22. Loans to Officers, Directors, and Employees.

Any officer, director, agent, or employee of any bank who shall lend to any other officer, director, agent, or employee, or who shall discount any note, draft, or other paper for such officer, director, agent, or employee, directly or indirectly without such loan or discount being approved by a majority of the directors or by the members of the committee of the board of directors authorized to act as provided in Article XIX, § 11, of this act, or who shall make any loan to any such officer, director, agent, or employee, which is not secured in the manner provided by Article XIX, § 12, of this act, or who shall be concerned in making any such loan or discount, shall be guilty of a misdemeanor.

This reenacts in substance § 211, Penal Code, modifying it to conform to the requirements of §§ 155 and 156 of the act.

§ 215. SEC. 23. Bank Officers Purchasing Its Paper at Discount.

If any president, director, officer, or agent of any bank shall by himself or agent, or in any other manner either for himself or for the bank, directly or indirectly, purchase, or be interested

in the purchase of any note, bill, certificate of deposit, check, or other evidence of debt issued by said bank for a less sum than shall appear then due on the face thereof, he shall be guilty of a misdemeanor: *Provided, however,* That a bank may discount its unmatured obligations at a rate not exceeding the legal rate of discount, such obligation to be immediately cancelled and satisfied.

This reenacts § 207, Penal Code, but adds the proviso at the end of the section.

§ 216. SEC. 24. Purchasing Shares with Capital Stock.

If any officer, director, or agent of any bank shall use or apply any part of the capital stock of such bank to the purchase of shares of its own stock, unless such purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, he shall be guilty of a misdemeanor.

This is a reenactment in substance of § 209, Penal Code, the right to purchase where necessary to prevent loss on a debt previously contracted being inserted in the Code section.

§ 217. SEC. 25. Unearned Dividends and Misuse of Capital.

Any director of any bank who concurs in any vote or act of the directors of such bank, by which it is intended to declare a dividend, except from the net profits arising from the business of the bank; or to divide, withdraw, or in any manner pay to the stockholders, or any of them, any part of the capital stock of the bank, or to purchase or reduce its capital stock, except in pursuance of law; or to discount and receive any note or other evidence of debt in payment of any installment of capital stock actually called in and required to be paid, with intent to provide the means of making such payment; or to receive or discount any note or other evidence of debt with the intent of enabling any stockholder to withdraw any part of the money paid in by him on any stock held by him in such bank; or to apply any portion of the funds of such bank, except as allowed by law, directly or indirectly, in the purchase of shares of its own stock, shall be guilty of a misdemeanor.

See § 174 and notes.

This section is taken from § 664, of the New York act. § 42 of the Alabama act is practically the same. The declaring of dividends except from net profits, and the distribution of capital as dividends was made a misdemeanor by §§ 208 and 740, P. C.

Books of bank properly admitted in evidence to prove dividends illegally disclosed. *Cabaniss v. State*, 8 App. 129 (19) (68 S. E. 849).

Conditions which made declaration of dividend illegal, evidence to show existence of, for some time prior thereto is relevant, as tending to establish condition of bank's affairs on day in question, as well as to show opportunities for knowledge of these conditions. 8 App. 129 (10) (68 S. E. 849).

Expert accountant may give summarized statement of what books show, where books not accessible. 8 App. 129 (14) (68 S. E. 849).

Indictment against president or one of directors need not set out the names of other directors not indicted, though they may have participated in declaration of dividend; offense of president or director is several rather than joint. 8 App. 129 (2) (68 S. E. 849).

Pendency of another indictment for same offense, no ground for plea in abatement. 8 App. 129 (5) (68 S. E. 849).

Motives of officers immaterial if they did those acts which are penal under this section. 8 App. 129 (7) (68 S. E. 849).

Solvency or insolvency is matter admitting of opinion evidence. There was no error in allowing one witness to testify as to correctness of list of insolvent papers, though he was ignorant of fact of solvency or insolvency of papers, and in allowing another witness, who could not swear to correctness of list, to testify as to solvency or insolvency of the papers. 8 App. 129 (16, 17) (68 S. E. 849).

Knowledge on part of defendants as to financial condition of corporation will be presumed, where evidence shows that, as officers in actual charge of current business, they had full opportunity to acquire such knowledge; and where it is also shown that they prepared and presented to directors a statement of financial status of corporation, and joined with directors in declaring dividend, and it subsequently appeared that this statement was not true, jury was authorized to infer that accused, with knowledge of true financial condition, made and presented false statements to deceive directors as to true financial status. *Mangham v. State*, 11 App. 440 (4) (75 S. E. 508).

Net Earnings: Dividends can be lawfully declared only out of net earnings; and the difference between the present value of all the corporate assets and the amount of all losses, expenses, other charges and liabilities, including capital stock, constitutes net earnings for purpose of dividends. It follows that an insolvent corporation cannot have net earnings out of which dividends can be declared. 11 App. 440 (2) (75 S. E. 508).

§ 218. SEC. 26. Overissue of Capital.

Any officer, agent, or director of any bank who knowingly and wilfully issues, participates in issuing, or concurs in any vote of the directors to issue any increase of its capital stock beyond the amount of the capital thereof duly authorized by or in pursuance of law, or who knowingly or wilfully sells, or agrees to sell, or who is interested, directly or indirectly, in the sale of any such shares of stock of such bank, or in any agreement to sell same, shall be guilty of a misdemeanor.

This is taken from § 43 of the Alabama law.

§ 219. SEC. 27. Certifying Checks.

Any officer of a bank certifying any check, draft, or order in violation of the provisions of § 37 of Article XIX of this act shall be guilty of a misdemeanor.

This reenacts in substance § 623, P. C. See note to § 181.

§ 220. SEC. 28. Bank Insolvency Deemed Fraudulent.

Every insolvency of a bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years: *Provided*, That the defendant in a case arising under this section may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner.

This is a reenactment of § 204, P. C., the section first appearing in the Penal Code of 1833. See 148/758; 18 App. 403 (7).

Debt, punishment provided by this section does not amount to imprisonment for. 7 App. 101 (2), 108 (66 S. E. 383).

Indictment should charge that bank became "fraudulently insolvent." 7 App. 101 (4), 111 (66 S. E. 383).

Intentional fraud and dishonesty of bank officials punishable under this section, not mere mismanagement resulting in insolvency. 7 App. 101 (2), 108 (66 S. E. 383).

Presumption that bank's insolvency due to fraudulent acts of its officials could be legalized as evidence by legislature. 7 App. 101 (3), 110 (66 S. E. 383); and see 124/15 (5) (52 S. E. 74); 128/668 (5) (57 S. E. 889). Either insolvency or failure to redeem bills raises presumption that crime committed in mismanagement of bank. 7 App. 101 (1) (66 S. E. 383).

§ 221. SEC. 29. Receiving Deposits After Insolvency.

When money is deposited on general deposit with any bank in this State, or with any company or individual doing a banking business in this State, and such bank, or company, or individual is insolvent at the time, and such insolvency is known to the officers having charge or control of such bank, or company, or to such individual, and loss or injury shall result to such depositor, then such individual or such officers having charge or control of such bank or company who, with the knowledge aforesaid, so received such deposits, shall be punished by imprisonment in the penitentiary for not less than one (1) year nor more than ten (10) years.

This reenacts § 205, Penal Code, with this change, § 205 made the officer or individual banker liable where the bank or individual "shall fail to pay the depositor or person entitled thereto within three days after the demand therefor, the said deposit or deposits," while this section makes the officer or individual liable where "loss or injury shall result to such depositor," no demand being necessary.

Alabama has a similar provision, § 41, Alabama act.

§ 222. SEC. 30. Certain Transfers, etc., of Stock, etc., Fraudulent.

The president, directors or officers of a bank, or any of them, who shall make, or consent to the making of any conveyance, assignment, transfer, mortgage, or lien, with intent to hinder, delay, or defraud creditors, after insolvency, or in contemplation thereof, whether the same be made to an innocent purchaser or to any other person shall severally be guilty of a misdemeanor.

This reenacts in substance § 206, P. C.

§ 223. SEC. 31. Penalty for Failing to Comply with Act.

Any officer, employee, director or agent of any bank or any other person whether connected with said bank or not, who shall wilfully violate any of the provisions of this act shall, unless otherwise provided in the act, be guilty of a misdemeanor.

This is a general section intended to cover all cases not specially provided for and in terms covered.

§ 224. SEC. 32. Libel of Bank.

Any person who shall publish or cause to be published any false statement, expressed either by printing or writing, or signs, pictures, or like, of or concerning any bank, as to the assets or liabilities of said bank, or as to its solvency or ability to meet its obligations, or as to its soundness, or who shall publish or cause to be published any other false statement so expressed, calculated to affect the credit or standing of said bank, or to cast suspicion upon its solvency, soundness, or ability to meet its deposits or other obligations, in due course, shall be guilty of a misdemeanor.

This and § 225 are designed to meet an evil to which banks are peculiarly subject and for which heretofore there has been no adequate redress. The language follows substantially that of § 340, P. C., defining criminal libel.

Statutes punishing derogatory statements affecting banks have been passed in twenty-three States.

§ 225. SEC. 33. Slander of Bank.

Any person who shall falsely circulate any report, or make any false oral statement as to the assets or liabilities of a bank, or as to its solvency or ability to meet its obligations, or as to its soundness; or who shall make any other false oral statement calculated to affect the credit or standing of said bank, or to cast suspicion upon its solvency, soundness, or ability to meet its deposits, or other obligations in due course, shall be guilty of a misdemeanor.

See notes to § 224.

§ 226. SEC. 34. Check or Draft Without Funds.

Any person who, with intent to defraud, shall make, or draw, or utter, or deliver any check, draft, or order for the payment of money upon any bank, or other depository, knowing at the time of such making, drawing, uttering or delivery that the maker or drawer has not sufficient funds in or credit with such bank, or other depository, for the payment of such check, draft or order in full upon its presentation, shall be guilty of a misdemeanor. The making, drawing, uttering or delivering of such check, draft or order as aforesaid, shall be *prima facie* evidence of intent to defraud. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank or depository for the payment of such check, draft or order.

This section is in the form recommended by the American Bankers' Association. It supersedes the Act of 1914, § 718 (d), P. C. That Act made the procuring of money or other thing of value upon a worthless check a misdemeanor provided the check was not made good in thirty days. Under this section the giving of the check "with intent to defraud" constitutes the offense, whether the person issuing or uttering the check obtains value therefore or not, and having committed the crime by the fraudulent issuing of the check the utterer is no longer allowed to compound it by making it good in thirty days, as he could do under the former statute. Thirty-eight States have enacted statutes in one form or another for the punishment of the crime of passing worthless checks.

§ 227. SEC. 35. Private Banker Using Unauthorized Name, Signs, etc.

Any private person or the members of any firm or voluntary association engaged in the business of banking who shall violate the provisions of section four (4), Article I, of this act, shall be guilty of a misdemeanor; *Provided, however*, That the provisions of this section shall not become operative until the ex-

piration of twelve (12) months from and after the time when this act shall go into effect.

A similar provision is found in § 141 of the New York law.

§ 228. SEC. 36. Stockholder Failing to Give Notice of Assessment to Pledgee.

Should any stockholder fail to give to any person, firm, or corporation to whom he shall have pledged or hypothecated any stock in any bank notice of any assessment levied thereon to make good the capital stock of any bank which may have become impaired, of which he has received notice and which assessment he shall fail or refuse to pay for any reason, by registered mail at least five (5) days before the expiration of the time within which such assessment may be paid, giving to such creditor the right to pay the same should he so desire, he shall be guilty of a misdemeanor. Proof by the person to be notified that no such notice has been received shall be *prima facie* evidence that such notice was not given.

This section affords a necessary protection to the pledgees or holders of bank stock as collateral in view of the provision of § 50 of the act authorizing the sale of stock to make good impairment of capital and the cancellation of the outstanding certificate.

§ 229. SEC. 37. Criminal Violations to Be Submitted to the Grand Juries.

The Superintendent of Banks shall have the right to submit to the grand juries of the respective counties of the State any criminal violations of the banking laws known by him to have occurred in such counties. But this provision shall not be so construed as to prevent the Superintendent or other persons from proceeding in such cases by affidavit and warrant.

A similar provision is made by § 47 of the Alabama law.

§ 230. SEC. 38. Misdemeanors, How Punished.

Upon conviction of a misdemeanor, as prescribed by the several provisions of this act, the offender shall be punished as prescribed by § 1065 of the Penal Code of Georgia.

§ 1065, P. C., is as follows:

"Except where otherwise provided, every crime declared to be a misdemeanor is punishable by a fine not to exceed one thousand dollars, imprisonment not to exceed six months, to work in the chain

gang on the public roads or on such other public works as the county or State authorities may employ the chain gang, not to exceed twelve months, any one or more of these punishments in the discretion of the judge: *Provided*, That nothing herein contained shall authorize the giving the control of convicts to private persons, or their employment by the county or State authorities in such mechanical pursuits as will bring the products of their labor into competition with the products of free labor. If the convict be a female, the judge may, in his discretion, sentence her to labor and confinement in the woman's prison on the State farm, in lieu of a chain gang sentence, not to exceed twelve months: *Provided*, That the trial judge shall have the discretion also of sending any person convicted of a misdemeanor to the State farm."

ARTICLE XXI.

Act to Take Effect, When.

§ 231. SECTION 1. Act, When to Take Effect.

This act shall take effect from and after the 1st day of January, 1920, and shall then supersede all existing laws regulating banks and banking in this State. On said date, or as soon thereafter as the Superintendent of Banks shall be appointed and qualified, the State Treasurer shall turn over and deliver to the Superintendent of Banks all moneys in his hands as *ex-officio* State Bank Examiner and all records, books, papers, property, and effects belonging to the Bank Bureau as now organized and conducted in the State Treasury. The receipt of the Superintendent of Banks shall be a full acquittance to the State Treasurer for all funds, records and property so turned over and delivered.

The act is intended to furnish a complete banking code, superseding all existing laws on the subject.

ARTICLE XXII.

Conflicting Laws Repealed.

§ 232. SECTION 1. General Repealing Clause.

All laws and parts of laws in conflict with this act, are hereby repealed.

TRUST COMPANIES.

(Acts 1898, p. 78, as amended, §§ 2815-2821 (e), Park's Ann. Code.)

Section 1. Their Incorporation.

§ 233. (§ 2815.) How Incorporated.

Any number of persons, not less than five, may associate themselves together for the purpose of organizing a trust company in accordance with the provisions of this act. The persons so desiring to become incorporated shall file in the office of the Secretary of State a declaration in writing, signed by each of them, stating their names, and residences, the name and style of the proposed corporation, the location of the principal business thereof, the amount of the capital stock, and such other matters as they may deem it desirable to state. Such declaration must be accompanied by the affidavit of at least three of the subscribers that at least twenty-five thousand dollars (\$25,000.00) of the capital stock subscribed has been actually paid in by the subscribers and that the same is in fact held and is to be used solely for the business or purposes of the corporation. A fee of fifty (\$50.00) dollars shall be paid, on filing the application into the treasury, and the Secretary of State shall not issue any charter before its payment.

Acts 1898, p. 78.

Constitutional, this act declared to be; it does not violate provisions of the Constitution embraced in § 6446. 120/1080 (4) (48 S. E. 437).

§ 234. (§ 2816.) Notice; Certificate of Incorporation.

Previous to filing the declaration, as provided in the preceding section hereof, a notice of intention to organize such trust company shall be published at least once a week for four weeks in a newspaper of general circulation published in the city in which the principal office of the proposed corporation will be located, which notice shall specify the names of the proposed corporators, name of the proposed trust company and the location of the same.

When such declaration shall have been filed and notice of intention shall have been published as herein provided, the Secretary of State shall issue to the subscribers, their associates, and successors, a certificate of incorporation under the seal of the

State, certifying that the subscribers, their associates and successors, are a body politic and corporate under the name and style designated in the declaration, and that such corporation has the capacity and powers conferred and is subject to all the duties and liabilities imposed by law. The Secretary of State shall record the declaration, affidavit and certificate of incorporation.

Acts of 1898, p. 78.

Section 2. Their Powers.

§ 235. (§ 2817.) Corporate Powers.

All trust companies organized under this act are declared to be corporations possessed of the powers and functions of corporations generally, and as such have power:

1. To make contracts.
2. To sue and be sued, complain and defend, in any court, as fully as natural persons.
3. *Fiscal Agent.* To act as the fiscal or transfer agent of any state, municipality, body politic or corporation, and in such capacity to receive and disburse money, and transfer, register and countersign certificates of stock, bonds, and other evidence of indebtedness.
4. *Deposits and Loans.* To receive deposits of trust moneys, securities and other personal property from any person or corporation, and to loan money on real estate or personal securities.
5. *Buy and Sell Real Estate.* To lease, purchase, hold and convey any and all real estate necessary in the transaction of its business, or which the purposes of the corporation may require, or which it shall acquire in satisfaction or partial satisfaction of debts due the corporation, under sales, judgments or mortgages or in settlement or partial settlement of debts due the corporation by any of its debtors.
6. *Trustee Under Mortgages and Bonds.* To act as trustee under any mortgage or bond issued by any government, state, municipality, body politic or corporation, and accept and execute any other municipal or corporate trust not inconsistent with the laws of this State.
7. *Trusts for Married Women.* To accept trusts from and execute trusts for married women in respect to their separate property, whether real or personal, and to be their agent in the

management of such property, or to transact any business in relation thereto.

8. *Guardian, etc., of Minors.* To act under the order or appointment of any court of record as guardian, receiver, or trustee of the estate of any minor, the annual income of which shall not be less than one hundred dollars and as depository of any moneys paid into court, whether for the benefit of any such minor, or any other person, corporation, or party.

9. *Management of Estate Property.* To take, accept and execute any and all such legal trusts, duties, and powers in regard to the holding, management and disposition of any estate and property, real or personal, and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by the Superior Court, or by any other court of record, or by any person, corporation, municipality or other authority, and the said corporation shall be accountable to all parties in interest for the faithful discharge of every such trust, duty, or power which it may so accept.

10. *Trustees Under Appointment of Persons or of Courts.* To take, accept and execute any and all such trusts and powers of whatever nature or description, as may be conferred upon or intrusted or committed to said company by any person or persons, or any body politic, corporation, or other authority, by grant, assignment, transfer, devise, bequest, or otherwise or which may be intrusted or committed or transferred to or invested in said company by order of the Superior Court or any other court of record or any ordinary, and to receive and take and hold any property or estate, real or personal, which may be the subject of any such trust.

11. *May Deal in Stocks, etc.* To purchase, invest in and sell stocks, bills of exchange, bonds and mortgages, and other securities; and when moneys or securities for moneys are borrowed or received on deposit or for investment, the bonds or obligations of the company may be given therefor, but nothing herein contained shall be construed as giving the right to issue bills to circulate as money.

12. *May Act as Executor or Administrator, and as Committee of Lunatics, etc.* To be appointed and accept the appointment of executor or of trustee under the last will and testament, or administrator with or without the will annexed, of the estate of any deceased person, and to be appointed and to act as the com-

mittee of the estates of lunatics, idiots, persons of unsound mind and habitual drunkards.

Acts of 1898, p. 78.
Administrator, ordinary may appoint trust company as. 120/1080
(4) (48 S. E. 437).

13. *May Guarantee Loans.* To engage in the business of guaranteeing the payment of bonds and notes secured by mortgage or deed to real estate within the State of Georgia: *Provided*, That every such company must, before it may issue any such guarantee, set apart an amount of not less than \$50,000 in any case, as a guaranty fund, which said guaranty fund shall be maintained unimpaired so long as any guaranty is outstanding.

Acts 1917, p. 56.

14. *May Guarantee Titles.* To engage in the business of certifying to the ownership of title to real property or furnishing information relative thereto, or of guaranteeing such titles or of guaranteeing owners of real property or other persons interested therein against loss by reason of defective titles or incumbrances thereon or adverse claim of title: *Provided*, That every such company must, before it may issue any title guarantee policy or guaranteed certificate of title, set apart an amount not less than one-third of its capital and surplus, and not less than \$50,000 in any case, as a guaranty fund, which said guaranty fund shall be maintained unimpaired so long as any title guarantee policies or guaranteed certificates of titles are outstanding.

Acts 1917, p. 56.

No trust company organized under the provisions of this act shall exercise any of the rights and powers conferred until at least one hundred thousand dollars of the capital stock shall have been subscribed and paid in; nor shall any such company receive deposits subject to check on demand or discount commercial paper unless and until such company shall have complied with the laws of this State regulating the incorporation of banks; but such company may acquire and exercise all the rights and privileges, and be subject to the same liabilities and restrictions as apply to banks, upon compliance with the laws of this State providing for the incorporation and regulating the business of banks.

Acts 1898, p. 78.

\$100,000 changed to \$50,000
Act 1920, page 76

Every such company exercising the powers granted by paragraph 13, or those granted by paragraph 14, aforesaid, may invest the guaranty fund therein provided for in legally issued bonds or securities of the United States, or of any State thereof, not estimated above their current market value; or in legally issued bonds, warrants or securities of any county, incorporated city, or town, or school district in this State, not estimated above their par value, or their current market value, or in lawful bonds and notes secured by mortgage or deed creating first lien on real estate within this State, and where buildings constitute a material part of the value of the mortgage premises they shall be kept insured against loss or damage by fire; such guaranty fund and the securities evidencing the same from time to time shall be deposited with the State Treasurer or with some trust company or one of the State depositories selected by the company so depositing them and approved by the State Treasurer, as custodian, such custodian giving proper receipts therefor.

Every such company exercising the powers granted by paragraph 13 or those granted by paragraph 14, aforesaid, shall make at least one report each year, and oftener if called upon by the State Bank Examiner, and in the same manner and subject to the same penalties as required of trust companies engaged in the banking business.

Acts 1917, p. 56.

Section 3. Organization and Management.

§ 236. (§ 2818.) Trustees, Their Election.

The affairs of said company shall be managed and its corporate powers exercised by a board of trustees of such number, not less than five nor more than twenty-five, as shall from time to time be prescribed by its by-laws. The persons named in the declaration of organization shall constitute the first board of trustees of the said company, and may add to their number not exceeding the limit of fifteen, and shall severally continue in office until others are elected to fill their places. The election of trustees shall be held annually at the office of the company, in such manner and at such time as shall be prescribed in the by-laws. In the case of failure to elect on the day named, the shareholders may adjourn to another time, or in the event of their failing so

to do the president may call a special meeting for the purpose of electing trustees, of which special meeting ten days' notice shall be given by publication in at least one newspaper of general circulation in the city in which such company is located. The vacancies occurring in the intervals of election shall be filled by the board of trustees.

Act 1898, p. 78.

Amended by Act of 1917, p. 82, changing the word "fifteen" in the fourth line of the section to "twenty-five."

§ 237. (§ 2819.) Powers of Trustees.

The trustees shall have power from time to time to make and establish such by-laws, rules and regulations, not inconsistent with the laws of this State or the United States, as they shall deem expedient for the conduct and management of the business affairs and property of such company. The said trustees shall elect one of their number president of the board, and may elect or appoint such other officer and agents as they may deem proper, and fix their compensation.

Act 1898, p. 78.

§ 238. (§ 2820.) Capital Stock.

The capital stock of the trust company may be increased from time to time by vote of two-thirds of the shareholders at any regular annual meeting, or special meeting called for the purpose, to a sum not exceeding two million (\$2,000,000.00) dollars. The capital stock shall be divided into shares of one hundred (\$100.00) dollars each, which shares shall be deemed personal property and shall be transferrable in such manner as shall be prescribed by the by-laws of the company.

Act 1898, p. 78.

Section 4. Other Corporations May Acquire Like Powers.

§ 239. (§ 2821.) How Other Corporations May Acquire Rights.

Any savings bank, trust, security or guarantee company having a paid in capital of not less than one hundred thousand (\$100,000.00) dollars, heretofore incorporated by the General Assembly of this State, with authority to exercise any trust powers, may ac-

quire all the rights, privileges and immunities, with the same restrictions as are specified in section three hereof in the following manner: The shareholders at any regular or special meeting called for that purpose may, by a vote of two-thirds of the stockholders present, pass a resolution declaring their desire to acquire the right, privileges and immunities, subject to the restrictions specified in section three of this act, which resolution shall be certified by the president and secretary or treasurer of the corporation, and filed with the Secretary of State. Whereupon the Secretary of State shall issue a certificate declaring that such resolution having been filed, such corporation has become vested by law with all the rights, powers and privileges, and subject to the restrictions conferred, defined and limited by section three of this act. The corporation filing such resolution shall pay into the treasury of the State a fee of twenty-five (\$25.00) dollars, and the Secretary of State shall cause said resolution and his certificate to be duly recorded.

Act of 1898, p. 98.

Bank, whether or not charter of, gave authority to act as trustee of bondholders secured by mortgage, this did not authorize decree, rendered in foreclosure proceedings, to be treated as a nullity, at instance of purchaser under sale by receivers appointed in such case. 136/789 (1) (72 S. E. 158).

§ 240. (§ 2821 (a.)) Corporations Chartered by Superior Court May Acquire Powers of Trust Companies.

Any corporation heretofore chartered by the Superior Courts of this State for the purpose of engaging in the borrowing and lending of money, or dealing in real estate, mortgages, bonds, and other evidences of debt, or for exercising any of the privileges granted to trust companies in this Article, and which desires to avail itself of all of the privileges of this Article, shall have power to do so by securing from the Secretary of State an amendment to the charter under which such corporation now exists, which amendment shall confer upon it all the privileges of this Article applicable to trust companies.

Acts 1910, p. 98.

§ 241. (§ 2821 (b.)) Directors Shall Authorize.

Before such amendment can be obtained the board of directors of such corporation, at a regular meeting, shall by a majority vote, authorize such amendment to the charter of such corporation.

Acts 1910, pp. 98, 99.

§ 242. (§ 2821 (c).) Capital Stock.

No corporation shall avail itself of this privilege until it has actually subscribed and paid in, either in actual cash, or property taken at a fair valuation, a capital stock of at least \$100,000.00.

Acts 1910, pp. 98, 99.

§ 243. (§ 2821 (d).) When Provisions Become Applicable.

When such amendment to the charter has been obtained, all the provisions applicable to trust companies shall thereupon apply to such corporation.

Acts 1910, pp. 98, 99.

§ 244. (§ 2821 (e).) Fee for Amendment.

The corporation filing its application for such amendment shall pay into the State Treasury a fee of twenty-five dollars, and the Secretary of State shall cause such amendment and his certificate to be duly recorded. All such amendments granted by the Secretary of State shall be recorded on charter book in the office of the clerk of the Superior Court where such original charter was granted.

Acts 1910, pp. 98, 99.

BANKS MAY ACQUIRE POWERS OF TRUST COMPANIES.

(Acts 1917, p. 81.)

§ 245. Powers of Trust Companies May Be Acquired.

Any banking company, heretofore or hereafter incorporated under the Constitution and laws of this State, having and exercising the rights, powers and privileges incident to banks, and having not less than one hundred thousand dollars (\$100,000.00) of capital stock subscribed and paid in, may acquire all the rights, powers, privileges and immunities, subject to the liabilities and restrictions conferred and imposed upon trust companies by the Act of the General Assembly of Georgia approved December 23, 1898 (§ 233 *et seq.*), in the manner hereinafter provided.

§ 246. Petition to Set Forth What.

Any such incorporated banking company, desiring to acquire the aforesaid rights, powers, privileges and immunities, shall file with the Secretary of State its petition setting forth:

(a) The name of such banking company, when and by what authority incorporated and its principal place of business;

(b) That it has a paid-in capital of not less than one hundred thousand dollars (\$100,000.00);

(c) That a resolution has been adopted by a majority vote of its board of directors expressing the desire that such banking company acquire the rights, powers, privileges and immunities, subject to the liabilities and restrictions, of trust companies under the aforesaid act approved December 23, 1898.

And there shall be attached to said petition as exhibitions:

(1) The certificate of the ordinary of the county in which the principal office of such banking company is located or, in the absence or disability of the ordinary, the certificate of such other official as may be authorized by law to perform the duties of the ordinary, to the effect that he is satisfied, after investigation, that the petitioning banking company has a paid-in capital of not less than one hundred thousand dollars (\$100,000.00).

(2) A copy of the resolution of its board of directors, expressing the desire to acquire such rights and privileges, certified by the cashier or secretary of such banking company, under its corporate seal, to be a true and correct extract from the minutes.

And such petition shall be signed on behalf of the banking company by its president or a vice-president and its corporate seal shall be affixed thereto, attested by its secretary or an assistant secretary; and said petition shall be verified by the oath of the president or a vice-president of such banking company to the effect that the facts set forth therein are true.

§ 247. Publication of Petition.

After petition has been filed with the Secretary of State as hereinbefore provided, a copy of such petition, without the exhibits, shall be published once a week for four (4) weeks in the newspaper in which the sheriff's advertisements are printed in the county in which the principal office of such banking company is located, and, after such publication, the petitioning banking company shall file with the Secretary of State the certificate of the ordinary of such county, or, in his absence or disability, the

certificate of such other official as may be authorized by law to perform the duties of the ordinary to the effect that a copy of such petition has been published as herein required.

§ 248. Certificate by Secretary of State.

When any such banking company shall have complied with the foregoing provisions, the Secretary of State shall issue to it a certificate under the seal of the State declaring its charter to be amended by the acquisition of, and by having vested in it, all the rights, powers, privileges and immunities, and subject to all the liabilities and restrictions conferred, defined, imposed and limited by the Act of the General Assembly of Georgia approved December 23, 1898, providing "for the incorporation of trust companies, to define their rights and powers, and for other purposes."

§ 249. Fee for Amendment.

The banking company filing a petition for an amendment to its charter under the provisions hereof shall pay into the treasury of the State a fee of twenty-five dollars (\$25.00), and the Secretary of State shall cause such petition and his certificate to be duly recorded.

§ 250. Directors to Act as Trustees.

Any banking company, amending its charter by the acquisition of the powers of trust companies hereunder, shall not be regarded to be managed and to exercise its corporate powers by a board of trustees, but the business of such corporation shall continue to be under the management and control of a board of directors, who shall possess all the powers, and be subject to all the duties conferred and imposed upon the directors of banking companies and upon the trustees of trust companies under the laws of this State.

This act was not repealed by the Banking Act of 1919. Opinion of the Attorney-General, February 17, 1920.

NATIONAL BANKS MAY EXERCISE TRUST POWERS.

(Acts 1917, p. 84.)

§ 251. Lawful to Act as Trustee.

It shall be lawful for any national bank located in this State, when empowered so to do by the laws of the United States, to act in this State by any and every method of appointment and in any capacity whatever as trustee and as executor, administrator or registrar of stocks and bonds.

§ 252. Oath.

The oath prescribed by the laws of this State to be taken by executors and administrators may be taken when a national bank acts in such capacity, either by the president, or a vice-president, or the cashier, or some trust officer designated for that purpose by the national bank proposing to so act. The oath as trustee, if required, may be taken in a similar manner.

§ 253. Bond.

Nothing herein contained shall be considered to relieve a national bank from giving a bond, when such bond under the laws of this State is required to be given by an individual acting in any of the aforesaid capacities.

The Federal Reserve Act (December 23, 1913, § 9794 (k), U. S. Comp. Stat.) authorized the Federal Reserve Board to permit national banks to act as trustee, executor, administrator, registrar, or in any other fiduciary capacity "when not in contravention of State or local law."

STATE DEPOSITORIES.

(Acts 1878-9, p. 88, as amended, §§ 1249-1262, Park's Ann. Code.)

§ 254. (§ 1249.) State Depositories Provided for in Various Cities.

The Governor shall name and appoint a solvent chartered bank of good standing and credit in each of the following cities and towns, to wit: In Atlanta, Athens, Augusta, Columbus, Macon,

Savannah, Rome, Americus, Albany, Hawkinsville, Gainesville, Griffin, LaGrange, Thomasville, Newnan, Cartersville, Dalton, Valdosta, Milledgeville, Darien, Dawson, Cordele, Marietta, Richland, Millen, Warrenton, Carrollton, Elberton, Monticello, Fort Gaines, Cedartown, Jackson, Harmony Grove, Thomaston, Covington, Blackshear, Waycross, Brunswick, Forsyth, Jefferson, Washington, Quitman, Greenville, Eastman, Moultrie, Toccoa, Statesboro, Tifton, Lawrenceville, Douglas, Dublin, Madison, Tennille, Sylvania, McRae, Cornelia, Fitzgerald, Bainbridge, Blue Ridge, Mt. Vernon, Barnesville, Baxley, Hartwell, LaFayette, Louisville, Montezuma, Pelham, Sandersville, Swainsboro, Thomson, Winder, Calhoun, Jesup, Lavonia, Donaldsonville, Claxton, Ashburn, Nashville, Blakely, Dallas, Perry, Fort Valley, Sparta, Reidsville, Comer, Fayetteville, Ludowici, Senoia, Cochran, Conyers, Hazelhurst, Lyons, Ocilla, Talbotton, Bremen, Butler, Cairo, Franklin, Tallapoosa, Georgetown, Gibson, Jonesboro, Jeffersonville, McDonough, Ringgold, Rochelle, Pembroke, Chipley, Colquitt, Guyton, Homerville, Jasper, Summerville, Canton Edison, Gordon, Alpharetta, Decatur, Eatonton, Fairburn, Lumpkin, Reynolds, Rockmart, Shellman, Uvalda, Folkston, Lincolnton, Sylvester, Temple, Boston, Douglasville, Buford, Dahlonega, Wrightsville, Camilla, Ellaville, Blairsville, Woodbury, Springfield, Irwinville, Manchester, Kingsland, Alma, Metter, Rebecca, Sylvester, Vidalia, Cumming, Vienna, Adel, and Soperton, [Glenwood, Greensboro, Morgan, Pearson, and Willacoochee]* which shall be known as State depositories: *Provided*, That in each of said cities having a population of sixty-five hundred and over, the Governor may name and appoint not more than two solvent chartered banks of good standing and credit, which shall be known and designated as State depositories. [Provided further, that in each of said cities in the State of Georgia having a population of 15,000 and over, according to the U. S. census of 1920, the Governor may name and appoint not more than three solvent chartered banks in good standing which shall be known and designated as State depositories.]*

Constitutional, Act of 1879 creating State depositories held to be; it did not contain more than one subject matter or matter different from caption. 66/609 (1).

State depositories are not public officers. 72 Ga. 501.

*Added by Act of 1920.

§ 255. (§ 1249 (a).) Second Depository in Atlanta.

Whenever the Governor, from the excess in the State depository heretofore existing in the city of Atlanta, or from the amount of cash on hand in the treasury, may deem it to the best interest of the State, he is hereby authorized to name and appoint a solvent chartered bank of good standing and credit as an additional depository in the city of Atlanta, subject to the terms and conditions of §§ 1249 to 1262, both inclusive, of the Civil Code, and the acts amendatory thereof: *Provided*, That no deposit shall be made with this additional depository so long as the first depository in the city of Atlanta has on hand belonging to the State an amount less than the maximum which the law allows.

Acts of 1901, p. 29.

§ 256. (§ 1249 (b).) Third Depository in Atlanta.

Whenever the Governor, from the excess in the State depositories heretofore existing in the city of Atlanta, or from the amount of cash on hand in the treasury, may deem it to be the best interests of the State, he is hereby authorized to appoint in said city a solvent chartered bank of good standing and credit as a State depository, so as to make three State depositories in said city. The said bank so appointed to be subject to the terms and conditions of this chapter, and the acts amendatory thereof.

Acts 1908, p. 37.

§ 257. (§ 1249 (c).) Fourth Depository in Atlanta.

Whenever the Governor, from the excess in the State depositories heretofore existing in the city of Atlanta, or from the amount of cash on hand in the treasury, may deem it to the best interests of the State, he is hereby authorized to appoint in said city a solvent chartered bank of good standing and credit as a State depository, so as to make four State depositories in said city. The said bank so appointed to be subject to the terms and conditions of this chapter and the acts amendatory thereof.

Acts 1911, p. 58.

§ 258. (§ 1249 (d).) Fifth Depository in Atlanta.

Whenever the Governor from the excess in the State depositories heretofore existing in the city of Atlanta, or from the

amount of cash on hand in the treasury, may deem it to the best interests of the State, he is hereby authorized to appoint in said city a solvent, chartered bank of good standing and credit as a State depository, so as to make five State depositories in said city. The said bank so appointed to be subject to the terms and conditions of this chapter and the acts amendatory thereof.

Acts 1914, p. 49.

§ 259. Sixth Depository in Atlanta.

Whenever the Governor, from the excess in the State depositories heretofore existing in the city of Atlanta, or from the amount of cash on hand in the treasury, may deem it to the best interests of the State, he is hereby authorized to appoint in said city a solvent chartered bank of good standing and credit, as a State depository, so as to make six State depositories in said city. The said bank so appointed to be subject to the terms and conditions of §§ 1294 to 1262, both inclusive, of the Code of Georgia of 1910 and the acts amendatory thereof.

Acts 1918, p. 141.

§ 260. (§ 1249 (e).) Third Depository in Macon.

Whenever the Governor, from the excess in the State depositories heretofore existing in the city of Macon, or from the amount of cash on hand in the treasury, may deem it to the best interests of the State, he is hereby authorized to appoint in said city a solvent chartered bank of good standing and credit as a State depository, so as to make three State depositories in said city. The said bank so appointed to be subject to the terms and conditions of this chapter and the acts amendatory thereof.

Acts 1912, p. 49.

§ 261. Another Depository in Toccoa.

Section 1249 of Volume I of the Code of 1910, providing for the selection by the Governor of banks in certain cities and towns therein named as State depositories, and the several acts amendatory thereof be and the same are hereby amended so as to add another bank to the town of Toccoa, in the county of Stephens, State of Georgia, to the list of such cities and towns.

Acts 1916, p. 35.

§ 262. (§ 1250.) Section of State Depositories, etc.

Said State depositories shall be appointed for the term of four years from the date of their appointment, and shall be liable to be removed by the Governor, in his discretion, for any neglect of their official duty, and they shall receive no salary or fees from the State of Georgia.

Acts 1878-9, p. 88; 1895, p. 22

§ 263. (§ 1251.) Contracts as to Interest to Be Paid.

The Governor shall make with depositories the most advantageous contracts for interest, to be paid by them to the State for the use of the State's money which may be deposited therein, as hereinafter provided by this chapter. And in the event any depository so named shall refuse to make satisfactory contract with the Governor as to interest to be paid, he shall have authority to remove such depository and appoint another. In the event only one bank is situated in any city designated as a legal depository, the Governor can place deposits in the depository nearest situated with whom a satisfactory contract has been made: *Provided*, That no officer of this State shall be allowed to receive any commission, interest, or reward to himself from any source for the depositing of such money in such depositories, or for continuing such deposits. But the receiving of any such benefit by any officer shall be a felony.

Acts 1878-9, p. 88; 1895, p. 22.

Receiver of insolvent State depository liable to the State for principal sum due and interest at the contract rate to the date of the appointment of the receiver, and also seven per cent. per annum as legal interest from the date of the receivership to the date of payment (one dissenting). 139/54, 55 (2) (76 S. E. 587).

§ 264. (§ 1252.) Depositories to Give Bond.

Each of said depositories shall, before entering upon the discharge of their duties by their proper officers, execute a bond with good and sufficient securities, to be fixed and to be approved by the Governor. Said bond shall be conditioned for the faithful performance of all such duties as shall be required of them by the General Assembly, or the laws of this State, and for a faithful account of the money or effects that may come into their hands during their continuance in office. Said bond shall be filed and recorded in the executive office, and a copy thereof, certified by one of the Governor's secretaries, under the seal of the

executive department, shall be received in evidence in lieu of the original in any of the courts of this State. And said bonds, when given, shall have the same binding force and effect as the bond now required by law to be given by State Treasurers, and, in case of default, shall be enforced in like manner. In fixing the bond to be given by a depository under this section, the Governor shall so fix the same as to make it not less than the amount of money intrusted to said depository and in no case shall a larger amount of money be deposited in any bank than the amount of the bond, and the Governor may at any time require additional bond, if necessary, to cover fully the amount deposited or intended to be deposited in such bank.

Acts 1903, p. 32; 1878-9, p. 88.

Appointment as depository, execution of bond a short time before, held immaterial. 72/502.

Change of officers and stockholders not affect corporate existence. If there was impropriety in transfer, Governor had no notice that was not equally accessible to surety, and surety not relieved on account of such change. 72/517 (4).

Execution issued by Governor instanter as on treasurer's bond (§ 224, Park's Ann. Code). 66/609 (2); 72/511.

False representations, by Governor, surety not relieved on ground of, where he lived in city where bank located and had opportunity to investigate condition of bank before signing bond. 72/517 (3).

Forged, if name of surety was, State had no lien on her property and purchaser of property from her obtained good title. Whether name of such surety forged, and whether she ratified signing are questions of fact for jury. 72/515. Forgery of signature of one surety not relieve another who entrusted bond to principal to obtain the signatures of the other sureties and deliver the bond, thus enabling it to deliver the bond and to receive the public funds. 72/518 (7). See President.

Insolvent at time of selection and giving of bond, though bank was, surety cannot relieve himself on ground that Governor selected bank as solvent and published it as one of the depositories and that surety was induced to become such by this fact. State takes bond for its security and does not guarantee bank's solvency to sureties. 72/517 (1, 2).

Lien of bond is same as lien of treasurer's bond, as provided in § 218, Park's Ann. Code. It extends to choses in action, dates from execution of bond, and everybody is bound to take notice of it. 66/609 (2); 72/511; 79/159 (1) (3 S. E. 646).

Money or effects received, sureties bound to see that bank makes faithful account of, whether such money or effects received from tax collector or treasurer. 72/518 (5).

President of bank, purchaser of property from, charged with notice that he was surety on bond. 72/501 (1). President having executed bond as president and signed it individually as surety could not be relieved from liability because name of surety, which he furnished and which appeared on bond after his own was signed, was forged; and purchasers of property from president, who were charged with notice that he was surety, could make no defense which he could not make. Id., 501 (2).

Public officers, depositories are not, in sense of that term as used in §§ 278-302, inclusive, Park's Ann. Code; they are instruments

or agencies *sui generis* and *sui juris*, standing on their on law as embodied in this chapter; principles ruled in 66/408, on law above cited relating to bonds of public officers, have no application to bonds of depositories. 72/501 (3).

Recording and filing, entry of, on bond not required; recital by Governor under seal of State sufficient evidence of such facts unless overcome by proof. 72/502. Fact that bond was not recorded on minutes of executive office, but was referred to in executive orders there recorded, did not relieve surety. 72/518 (6-a).

Returns to Governor according to law, surety not relieved because his principal did not make, nor because Governor did not remove or discontinue the principal as a depository. 72/518 (6).

State entitled to priority of payment out of assets of insolvent bank which is State depository, as against individual creditors and depositors; there is nothing in law relating to State depositories that changes or modifies this right of State. 66/609 (4); see 18/65 (7-9); 101/244 (28 S. E. 604); 131/750 (2) (63 S. E. 502); 134/163 (1) (67 S. E. 803); 139/54, 55 (2-a) (76 S. E. 587). Depositors in insolvent State depository who are indebted to it by promissory notes can set off against such notes the amounts justly due them on their deposits. 94/95 (21 S. E. 146). Where funds arising partly from oil-inspection fees, and partly from private donations, were deposited in his own name by treasurer of board of trustees of agricultural and mechanical school, in a State depository which failed, this was not such a debt due the State as created a lien in its favor by virtue of its general sovereignty or under the law in reference to State depositories. 137/537 (73 S. E. 825).

Sufficient, bond here was. 72/501 (3), 512.

§ 265. (§ 1253.) When Governor May Appoint New Depositories.

Whenever from any cause the State depositories in any locality shall cease to operate, it shall be the duty of the Governor to make another appointment, either to fill out the unexpired term or to enter upon a new term of four years, as the case may be. Said newly appointed depository shall have all the powers, perform all the duties, and be subject to all the liabilities prescribed for State depositories, and shall furnish a like bond in which each of the sureties shall bind themselves for the entire amount of the bond. In selecting any depository the Governor shall not be confined to banks chartered by the State, but may, if he deem it best, select any bank chartered under the National Bank Act of the United States doing business in this State.

Acts 1882-3, p. 138.

§ 266. (§ 1254.) Treasurer to Advise Governor of Financial Condition of State Depositories.

It shall be the duty of the Treasurer to keep advised and to keep the Governor advised, from time to time, of the financial condition of the various State depositories, as well as of the

financial condition and standing of the securities on the bonds of such depositories, and if at any time they shall become satisfied of the insolvency of any of the depositories, or that the affairs of any of said depositories are in an embarrassed condition, it shall be the duty of the Governor to direct the Treasurer to withdraw the money of the State from such depository, and the Governor may declare the position vacant and may proceed to appoint another bank in the same locality to act as such depository for the unexpired term under the rules and regulations prescribed by law. In case the Governor should be advised of the insolvency of the securities on the bond of any of said depositories, it shall be his duty to notify such depository to strengthen said bond, and if at the end of ten days said bond is not strengthened, the Governor shall declare said office vacant and proceed to fill the same by new appointment.

Acts 1882-3, p. 138.

§ 267. (§ 1255.) Sureties, How Relieved.

Any surety on the bond of a State depository desiring to be relieved from said bond may give notice in writing to the Governor of such desire, with the reasons therefor, and the Governor shall have authority, in his discretion, to relieve such surety: *Provided*, The consent of the cosureties be first obtained in writing. *And provided further*, That the principal will furnish a new surety to take the place of the surety relieved, and who will assume all his liabilities for past and future transactions.

Acts 1882-3, p. 138.

§ 268. (§ 1256.) Amount of State's Deposit Limited to Amount of Bond of Depository.

The Treasurer of this State shall not deposit at any one time, or have on deposit at any one time, in any one of the depositories of this State for a longer time than ten days, a sum of money belonging to this State that exceeds the bond given by said depository to the State. The Treasurer shall check from any depository the amount of the State's money that said depository holds in excess of its bond and pay the sum into the treasury: *Provided*, That a State depository may be allowed to hold a sum greater than fifty thousand dollars, but not in excess of one hundred thousand dollars, upon such depository giving a new

bond to cover the maximum amount to be deposited with it, and when such new bond has been executed and delivered to the Governor, the old bond shall be discharged and surrendered; and whenever a national bank is selected as a State depository, the amount of the bond shall be double the amount of money to be deposited with it. The bond to be made by the State depositories may be a personal bond or may be made by a deposit with the State Treasurer of United States bonds, or Georgia State bonds, or either one or both of said methods.

Acts 1893, p. 135.

State has prior lien for all sums deposited although in excess of the bond. 101/244 (28 S. E. 604).

§ 269. (§ 1257.) Monthly Statements of Depositories.

Depositories shall render to both the Governor and the Treasurer such monthly statements as they now are required by law to make to the Treasurer.

Acts 1893, p. 135.

§ 270. (§ 1258.) Governor Authorized to Sell Bonds of Defaulting Bank.

Whenever any bank which has been made a State depository and has deposited bonds, shall fail to faithfully perform such duties as shall be required of them by the General Assembly or the laws of this State, or shall fail to faithfully account for all the public moneys or effects that may have come into its hands during its continuance in office, the Governor shall sell a sufficiency of said bonds to reimburse the State the amounts due by the State depository on account of such default.

Acts 1889, p. 177.

§ 271. (§ 1259.) Funds Subject to Check, etc.

Said depositories shall hold all funds received by them for and on account of the State, subject to the check or order of the State Treasurer, and shall render to the State Treasurer, on the first day of every month, a statement of the money on hand belonging to the State, showing the time when and from whom received, together with a statement and balance sheet showing the exact condition of its account with the State Treasurer on that day; and whenever any tax collector shall make a deposit

in said depositories they shall give to said tax collector a receipt, which shall be a good and sufficient voucher to said collector, and they shall mail to the State Treasurer a duplicate of the receipt so given to said tax collector, and so soon as the Treasurer shall receive said duplicate receipt he shall issue his certificate in favor of the depositing tax collector, and transmit the same to the Comptroller-General, who shall pass the amount therein mentioned to the credit of said tax collector, and at once mail to him a receipt for said amount.

Acts 1878-9, p. 88.

§ 272. (§ 1260.) Tax Collectors May Pay Funds at Depositories.

The Governor shall, at the time of appointing the State depositories, make a list of the counties whose tax collectors shall be instructed to pay State funds into each depository, and said tax collectors shall pay into no other depository than the one named by the Governor, and the Governor shall also make known the apportionment of counties by a proclamation, duly published in the city where such depository is located, giving the name of the depository, and the name of the counties whose tax collectors shall be instructed to pay into said depository all moneys collected by them for and on account of State taxes.

Acts 1878-9, p. 88.

§ 273. (§ 1261.) Tax Officers May Also Pay at Treasury.

Nothing contained in this chapter shall be construed to prevent tax collectors from paying State funds directly into the State treasury. And it shall not be lawful for the State Treasurer to deposit such funds in any bank or other depository except those established under this chapter, and he shall, by check, or other proper means, draw from said depositories such amounts only, and at such times only, as the necessities of his department may require.

Acts 1878-9, p. 88.

Sureties bound for faithful account of public money, whether received from tax collector or treasurer. 72/518 (5).

Treasurer may make other deposits than taxes. 72 Ga. 518.

§ 274. (§ 1262.) Treasurer's Bond Not Affected.

Nothing contained in this chapter shall be held, taken or construed as affecting, altering or changing the provisions of existing laws as to the bond of the State Treasurer.

Acts 1878-9, p. 90.

COUNTY TREASURERS MAY DEPOSIT COUNTY FUNDS IN STATE DEPOSITORYIES.

(Acts 1917, p. 199.)

§ 275. County Treasurer May Deposit in State Depository.

The treasurers of the several counties of this State are hereby authorized to deposit in any bank or banking institution which has been designated by law as a depository for the funds of the State the county funds which may come into their hands as county treasurers.

§ 276. Additional Bond Required.

Any depository of the State funds so selected by the county treasurer to be a depository of the county funds shall, in addition to the bond given to the State as security for the money of the State deposited in said bank, give to the county treasurer a bond in an amount sufficient to protect him from any loss, which bond shall be payable to him, and shall be conditioned to fully account to him for all county moneys that may be deposited by him as such treasurer under the terms of this act.

§ 277. Interest.

The said county treasurers are hereby authorized to arrange with the bank to pay interest on the money so deposited with said bank, but they are not required so to do, and any money received by them as interest is hereby required to be paid by them into the treasury of the county.

TAXATION OF BANKS.

(General Tax Act of 1909, p. 70, § 991, Park's Ann. Code.)

§ 278. (§ 991.) Banks.

No tax shall be assessed upon the capital of banks, or banking associations, organized under the authority of this State, or of the United States, located within this State, but the shares of the stockholders of the banks or banking associations, whether resident or nonresident owners, shall be taxed in the county where the banks or banking associations are located, and not elsewhere, at their full market value, including surplus and undivided profits, at the same rate provided in this Article for the taxation of moneyed capital in the hands of private individuals: *Provided*, That nothing in this section contained shall be construed to relieve such banks or banking associations from the tax on real estate held or owned by them; but they shall return said real estate at its fair market value, in the county where located. *Provided further*, That where said real estate is fully paid for, the value at which it is returned for taxation may be deducted from the market value of their shares; and if said real estate is not fully paid for, only the value at which the equity owned by them therein is returned for taxation shall be deducted from the market value of their shares.

The banks or banking associations themselves shall make the returns of the property and the shares herein mentioned, and pay the taxes herein provided. *Provided further*, That all property used in conducting or operating a branch bank shall be returned for taxation in the county where such branch bank may be located. The true intent and meaning of this section is that the bank itself shall return for taxation and pay the taxes on the full market value of all shares of said bank stock.

The States not being permitted to tax National Banks except upon their real estate, but being authorized to tax the shares of stock, § 5219, U. S. R. S., the method of taxation provided by this section was adopted to put all chartered banks, State and national, upon the same basis. With slight changes in phraseology, this section has appeared in each of the General Tax Acts for many years.

"This statute (§ 5219, U. S. R. S.) forbids assessing officers from the valuing of some property at a certain percentage of its true value in money, and applying another percentage to other property and a larger percentage to the shares of stock of a bank. It is immaterial that shares of bank stock are assessed on that basis as less than their true value in money, that rule being prescribed by the State law." *Pelton v. Bank*, 101 U. S. 143; *Cummings v. Bank*, 101 U. S. 153.

POWER OF FOREIGN EXECUTOR, ADMINISTRATOR OR GUARDIAN.

(Acts of 1893, p. 36, § 4105, Park's Ann. Code.)

§ 279. Transfer of Stock, Collection of Dividends, by Foreign Executor, Administrator or Guardian.

A foreign executor or administrator or foreign guardian may transfer the stock of any bank or other corporation in this State standing in the name of the decedent or ward, and check for deposits made by him and dividends declared on his stock, first filing with the bank or corporation a certified copy of his appointment and qualification: *Provided, however,* That no stock shall be transferred until the foreign executor, administrator, or guardian shall have given notice once a week for four weeks in the paper in which the sheriff's notices are published in the county of the principal office of the corporation, of his intention to make said transfer.

This section applies to executors, etc., holding appointments from courts in other States of the United States, and possibly in the Territories.

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33

PART II.

**Digest of Decisions of the Supreme Court and
the Court of Appeals of Georgia on
Banks and Banking.**



Digest of Decisions of the Supreme Court and Court of Appeals of Georgia On Banks and Banking

Accountant and General Manager.

Accountant and general manager of bank not presumed to have authority or be charged with duty of discounting papers for the bank. 110/494 (35 S. E. 780).

Advances.

Agreement to advance money to cover margins in cotton futures, on deposit of collaterals, not enforced. 102/808 (30 S. E. 267).

Contract between bank and manufacturer whereby bank agreed to advance him certain sum, manufacturer not being bound to take whole or any part unless it was necessary in conducting his business, was unilateral, there being no binding obligation to borrow any definite sum. 121/714 (49 S. E. 673).

Advances made by bank to cotton buyer under agreement that bank to have title to goods until reimbursed by payment of drafts drawn by buyer upon his customers, held that where purchase made and goods delivered to buyer himself, bank paying price thereof on his check without having obtained

actual or constructive possession of goods, title passed to buyer. 101/345 (2) (28 S. E. 863).

Attachment.

See **Bill of Lading.**

Attorney.

Attorney for bank whose duties were to act as general adviser of bank's officers and to collect overdue claims had no authority to make sale of land belonging to bank. Nor could cashier or director ratify such sale. 108/376 (33 S. E. 1003).

Answer to action on note that plaintiff's attorney was director of plaintiff bank and interfered with defendants' efforts to meet their indebtedness to bank was demurrable, in absence of showing that attorney was acting within scope of his employment or authority from bank. 141/565, 566 (4) (81 S. E. 886).

See **Cashier.**

Bank Notes.

Statutes passed for protection of bank notes liberally construed. 18/66 (6).

While bank notes occupy for some purposes the position of

securities, yet, in addition they are considered as and subserve the purposes of money. 13/298.

Loser of bank notes can require payment by bank upon offering suitable indemnity. 18/67 (17); see R. M. Charl. 193.

Setting apart of bank bills as a pledge was not an issuing of such bills as circulating currency. 1/435.

Circulation of bank notes when below par not illegal; holder may collect in full though he obtained notes at a discount. 26/17 (1, 2).

Statute of limitations does not apply to bank bills. 13/288 (4); see 49/419 (2).

In suit against assignee upon bills of the bank, where there is no plea of *non est factum*, it is not necessary to prove the execution of the bills. 30/77C (1).

In suit on bank notes, it is not necessary to describe them by numbers and letters. 7/79.

Nor is it necessary to aver and prove a demand. 8/469.

But where a bank note is payable on demand at a particular time and place, demand must be averred and proved. 13/287.

Where issued and circulated, paid in capital stock must be first applied to payment of bank notes. 24/273 (1).

Directors issuing notes before required amount of capital stock paid in, if bank became insolvent, bill holders and creditors might proceed at once against stockholders and directors. 24/273 (2).

Bill of Lading.

Where goods shipped upon bill of lading attached to draft, delivery of goods without payment of draft was conversion subjecting bank to action of trover. 98/576 (25 S. E. 584).

Where consignor deposited with bank bill of lading attached to draft on consignee and amount was entered to his credit under circumstances entitling him to draw upon bank at once for proceeds, jury could infer that intention was to make equitable assignment from consignor to bank of fund representing purchase price of goods. 91/307 (18 S. E. 188).

Draft and attached bill of lading endorsed in blank and deposited, amount being credited to depositor and drawn against by him, became property of bank, and the bank's title to the goods sold is superior to subsequent lien against seller. 136/372 (71 S. E. 660).

Bank not liable as joint vendor with consignor who shipped goods and drew draft with bill of lading attached indorsing it in blank and delivering it with draft to bank, indorsing draft for deposit to his own credit. 89/108 (2) (14 S. E. 891).

No such relation between consignee of goods and bank arises simply upon the purchase by the bank of a draft and bill of lading as will entitle consignee to recover of bank for a breach of duty imposed by law upon the seller. — App. — (101 S. E. 6).

Where sellers drew draft on buyers, with bill of lading at-

tached, and it was deposited to their credit, and they drew checks against same, title to goods and to proceeds of draft vested in bank. 15 App. 319 (5).

Proceeds of draft attached to bill of lading not subject to attachment taken out by drawee of draft against drawer after collection by bank which had purchased same. 142/265 (1) (82 S. E. 658).

Evidence here held not in conflict with positive testimony that draft had been sold at discount to bank in which it was deposited and that proceeds were deposited to drawer's credit. 142/265 (2) (82 S. E. 658).

Indorsement by bank guaranteeing all previous indorsements of draft has no reference to bill of lading attached and bank not liable to drawee upon payment of draft where bill of lading was forged. 20 App. 242 (92 S. E. 968).

Bills of Exchange.

See Checks.

Bond.

Where bank authorized to appoint necessary officers and make by-laws and rules, and by-laws provided that every officer should perform such duties as should be required of him, and where book-keeper gave bond to faithfully perform all duties of his office and all other duties required of him, held that such bond was authorized by charter, and that where book-keeper in discharge of "other duties" in the bank took money therefrom, the

sureties were liable. R. M. Charl. 29.

Bank teller could be appointed assistant cashier without notice to surety company, under terms of bond in this case. 97/634 (1) (25 S. E. 392).

Notice of employee's default required, but no duty of supervising his conduct imposed, knowledge of co-employee not imputable to bank. 97/635 (2) (25 S. E. 392).

Plea alleging knowledge, but not alleging failure to notify, stricken. 97/635 (3) (25 S. E. 392).

Building and Loan Association.

See Savings Bank.

By-Law Lien.

See Stock.

Capital Stock.

Where single amount is named in charter, it is both the maximum and the minimum amount. 148/764 (98 S. E. 466).

Organizers transacting business before minimum capital stock paid in, liable to creditors. 148/764 (98 S. E. 466).

Banks can not use any part of their capital stock in order to purchase their own shares: discussion of the law and its history. 133/332 (2), 337 (65 S. E. 859) and citations.

See Insolvency.

Cashier.

Authority of.

The cashier is the receiving officer and agent of the bank. 7/196.

Cashier may do, independently of directors, whatever

properly appertains to his office; one of the acts which properly appertains to his office is to pay debts of bank by transfer of negotiable securities. 10/10 (4).

Usually question of discounting paper comes before directors, and cashier is only executive officer to carry out their decision; but, beyond his inherent powers, cashier may be authorized to act for bank by the organic law, by action of stockholders, by vote of the board, or by usage and tacit approval. 109/12, 21 (34 S. E. 378).

Provision in charter requiring all contracts to be signed by president and countersigned by cashier not apply to such dealings and transactions as are usually and necessarily performed by cashier. 1/418; 7/84.

Charter providing that contracts should be signed and countersigned by president and cashier, held that bills signed by vice-president and countersigned by assistant cashier, there being in office at the time a president and cashier, were not binding. 31/371 (2).

Evidence that cashier frequently issued certificates of deposit, admissible to show he had authority to do so. 20/276 (6).

Cashier had no authority to ratify unauthorized sale by bank's attorney of land belonging to the bank. 108/376 (33 S. E. 1003).

Promise by cashier without consideration, to drawer of draft, to pay same out of funds of customer on whom draft drawn held not enforceable

against bank, unless customer assents that bank shall make such application of funds placed to his credit. 121/527 (49 S. E. 615); 23 App. 279 (4) (98 S. E. 112).

Where bank directors, chargeable with knowledge of transaction, acquiesced in cashier's acceptance of new notes, in satisfaction of note previously given, they were estopped to assert cashier's lack of authority. 15 App. 772 (3) (84 S. E. 157).

Bank directors are chargeable with knowledge of act of cashier in accepting new notes in satisfaction of note previously given to bank. 15 App. 772 (3) (84 S. E. 157).

Authority of cashier to compromise or discharge debts due bank, without payment or receipt of other securities, must be shown by implication or usage, or there must have been ratification by bank. 15 App. 815 (1) (84 S. E. 232).

Cashier can not bind bank by lending money to himself, whatever may be his general authority as to making loans. 126/702, 709 (56 S. E. 55).

Agency of cashier to assign bank's assets in his custody not extend to assets held as collateral for loan made to another person for the cashier's benefit, the collaterals not belonging to such other person but to the cashier himself. 92/735 (2) (19 S. E. 38).

Bank paying unauthorized draft made by one as cashier of another bank, after he had ceased to be cashier, could assume, without inquiry, that he acted with authority, under

facts here. 20 App. 236 (92 S. E. 953).

Cashier has no authority to lend bank's money, unless authorized so to do by charter or by-laws; bank not liable for breach of his contract to lend money without authority and in violation of the banking laws. 3 App. 364 (2) (60 S. E. 13).

Act of cashier in delivering up to subscriber his note for stock upon transfer of the stock to third person, held to have been ratified by bank. 24/540, 546.

Where cashier performed illegal act for benefit of bank and it was known to directors, or would have been known to them if they had bestowed ordinary attention on affairs of their office, and they did not repudiate it, it was the act of the bank. 20/276 (8).

Cashier's contract to lend money in violation of the banking laws of the State could not be rendered legal by ratification or binding by estoppel. 3 App. 364 (3) (60 S. E. 13).

Cashier held not liable in damages for failure to notify customer of insolvency of bank. 77/152.

Cashier's character for honesty proven good when employed, bank can not rely on presumption that he remains honest. 95/394, 396 (22 S. E. 628).

Dealings With and By.

Where draft payable to, and indorsed by one as cashier, the indorsement is *prima facie* that of the bank. 16/458.

Note indorsed to cashier as such, bank may sue thereon.

Declaration should allege that such person is cashier and that ownership of note is in bank. 97/524 (1) (25 S. E. 348).

Suit by bank on note payable to person as cashier amendable by alleging such person is cashier and that bank owns note. 102/109 (29 S. E. 144).

Testimony as to whether transactions were with cashier as such, or as individual, is inadmissible. 18 App. 610 (89 S. E. 1095).

Fact that cashier acted for bank in making loan and also sold borrower an automobile, receiving therefor the proceeds of the loan, not render bank liable for breach of the seller's warranties where bank not shown to have furthered or participated in the sale. Statement by cashier that bank would guarantee terms of seller's warranty not render bank liable since such undertaking would be *ultra vires* and void. — App. — (101 S. E. 196).

Where cashier, together with other officers, for the purpose of concealing the true financial condition of the bank, give their individual notes for money borrowed, such an arrangement, if known to the lender, is contrary to public policy, and the bank is not liable on the notes although the money realized therefrom was placed to its credit with the lender. 146/799, 802 (92 S. E. 525).

Borrower for secret use of cashier could not hold bank liable for collaterals belonging to cashier deposited to secure the loan and abstracted by the cashier. 92/735 (1) (19 S. E. 38).

Notice to.

Notice to cashier is notice to bank. 6/44 (1); 17/100 (3); see 113/527 (2) (38 S. E. 947).

Bank not bound by conduct and knowledge of cashier in making loan for his own benefit on note of another and stock as collateral, such other person having notice of rule of bank that officer could not become its debtor. 73/223; see 75/149; 92/735 (1) (19 S. E. 38); 110/827, 848 (36 S. E. 256).

Where president and cashier of bank were members of partnership and, without knowledge of other member thereof, executed and delivered to bank a note in partnership name for purpose of raising money they had agreed to put into partnership business, partnership not liable on note, though money in fact used for purpose stated. Under these circumstances knowledge of president and cashier was knowledge of bank. 97/527 (25 S. E. 360); see 3 App. 287 (1) (59 S. E. 844); 5 App. 600 (3) (63 S. E. 648).

Bank required to notify bonding company of employee's default, but no duty of supervising his conduct imposed, knowledge of cashier not imputable to bank. 97/634 (2) (25 S. E. 392).

Where an individual has an interest in note which he knows was given without consideration and such individual as cashier having control of discounts of bank discounts such note with funds of bank, the latter is not a *bona fide* holder. 109/12 (2) (34 S. E. 378).

See Deed; Directors; National Banks; President.

Cashier's Check.

See **Check**.

Certificate of Deposit.

See **Cashier; Deposit; Director**.

Certified Check.

See **Check**.

Charter.

Charters of banks held to be contracts. Each stockholder by his acceptance of charter, becomes party to contract and is bound by its provisions. 19/325 (1, 2); see 37/411; 53/512.

Charter of bank granted by General Assembly, is public law, and courts take cognizance thereof. 31/69; 66/177; 15 App. 520 (5) (83 S. E. 891); 18 App. 402 (7) (89 S. E. 625).

From time that certificate is made and filed to organize banking association, every party to action is precluded from denying corporate existence of association. 16 App. 820, 821 (86 S. E. 644).

Certificate made and filed to organize banking association is evidence that statute has been complied with and company duly organized. 16 App. 820, 821 (8) (86 S. E. 644).

Certificate to organize banking association is revocable for fraud in its procurement only in direct proceeding brought by State. 16 App. 820, 821 (8) (86 S. E. 644).

Check.**As Payment.**

Check payment, when itself paid. 58/258.

Bank check tendered in payment is not such until paid. 138/73 (1) (74 S. E. 770).

Check given in payment of note, holder of note not bound to surrender it unless there is an agreement that check be received as payment. 8 App. 513 (3) (69 S. E. 923).

Charging depositor with amount of check by bank on which drawn and to which sent for collection, equivalent to payment. 117/772 (54 S. E. 47); and see 95/277 (21 S. E. 717).

Where amount of check is charged to drawer's account by the drawee bank, drawer is discharged and bank cashing check for payee is subrogated to his rights and has action against drawee bank. 8 App. 182 (2) (68 S. E. 872).

Bill of Exchange.

Difference between check and bill of exchange. 46/487, 491; 92/732 (19 S. E. 55).

Cashier's Check.

Banker's check means check drawn by banker as distinguished from check drawn on bank by depositor. 8 App. 714 (3) (70 S. E. 151).

Holder of cashier's check may sue bank as maker without joining payee or indorser. 143/293 (1) (84 S. E. 966).

Cashier's check is primary obligation of the bank. 143/293 (1) (84 S. E. 966).

Holder in good faith of cashier's check payable to fictitious payee is entitled to sue bank as maker thereon. 143/293 (2).

Cashier's check, payable to order of person having no knowledge of the transaction

or interest in the check, and not intended to be party to the transaction, may be deemed payable to fictitious payee. 143/293 (2).

Where dishonored check declared on is attached to petition and alleged to have been signed by an individual as cashier, authority of cashier to make check is sufficiently alleged. 144/120 (3) (86 S. E. 317).

Certified Check.

A certified check is a check drawn by depositor upon his funds in the bank, which the proper officer of the bank certifies will be paid when duly presented. 8 App. 714 (3) (70 S. E. 151).

Collection.

Where unauthorized collection of check ratified by payee's conduct, bank not liable. 97/383 (23 S. E. 823).

Bank receiving from depositor check upon another bank and crediting it on his pass book, not as cash, but as a check, not held to be an absolute purchaser of the check. 95/277 (1) (21 S. E. 717); see 136/372 (71 S. E. 660).

Where drawee bank, to which check had been sent for collection, charged depositor with amount thereof, this was equivalent to payment. Drawee then held proceeds as agent of payee and drawer was discharged from liability on debt for which check given. 117/772 (45 S. E. 47).

Where check indorsed to bank "for collection and credit for deposit" to payee's account, bank is payee's agent to collect and title to check does not pass

to bank in absence of agreement evidenced otherwise than by language of indorsement. Such agency revocable by payee at any time before collection and may be terminated by instructing drawee bank to withhold payment. 10 App. 716 1, 2 (74 S. E. 78).

Where owner of check delivers it to bank for collection and, before proceeds remitted, bank fails, owner not entitled to priority over general creditors of bank. 10 App. 716 (3) (74 S. E. 78) and citations.

Consideration.

Check is a contract in writing and not mere request on third party to pay money; it imports a consideration and none need be alleged in suit to collect amount due thereon. 135/865 (1) (70 S. E. 798).

Check imports its own consideration in the sense that consideration will be presumed until contrary appears. 4 App. 253 (3) (61 S. E. 138).

As between immediate parties, check must be supported by consideration, in order to be enforceable against maker. 4 App. 253 (2) (61 S. E. 138).

When sued by payee, maker can show by parol that check is without consideration or that consideration has failed. 4 App. 253 (2-a) (61 S. E. 138).

Plea that check given by defendant without consideration but with understanding that, if third person would turn certain money over to defendant in future, check would be paid out of it, and that money has never been turned over to defendant, sets out good defense. 4 App. 253 (2-a) (61 S. E. 138).

Check sued on, *prima facie* case made by proof of execution and delivery, presentment to drawee, and refusal to pay. 4 App. 253 (3) (61 S. E. 138).

Declaration setting out check and alleging that it was given by defendant to pay for goods delivered by plaintiff to third person, and that check was duly presented and payment refused, set out cause of action. 4 App. 253 (1) (61 S. E. 138).

Dishonor.

Indorser of check discharged from liability if check not presented with reasonable diligence. Drawer not discharged if presentation made any time before suit is brought, unless he is injured thereby, and then only to extent of his injury. 1/304; 5/245; 44/406; 95/376 (22 S. E. 543); 100/147 (3) (27 S. E. 979); 1 App. 244 (4) (58 S. E. 212).

Drawer of check not held liable if check dishonored by reason of insolvency of drawee bank, and loss resulted, unless check presented within reasonable time; what is reasonable time depends upon circumstances. 99/585 (27 S. E. 147).

In order to hold payee of check liable for failure to present it, in event of failure of drawee, maker must have in bank at all times after drawing check either funds of his own or some agreement with bank which will guarantee payment at such time as holder may choose to present the check. And it must appear that payee has accepted check from drawer or that he is under some ob-

ligation to do so. 1 App. 244 (1, 2) (58 S. E. 212).

Issuance of check includes two guarantees on part of maker,—that drawee is solvent and that check will be paid on presentation. 1 App. 244 (3), (58 S. E. 212).

Check bearing direction of maker that it is payable through named bank, drawee not bound to pay, unless check presented through bank specified. Third bank holding check protesting for non-payment upon refusal of drawee to pay, liable therefore to drawer. 134/486 (68 S. E. 85).

"Subject to check" means subject to payment without limitation or restriction, except that the check must be presented on banking days within banking hours. 114/788 (2) (40 S. E. 825).

Refusal of bank to pay depositor's check in other funds than Confederate notes, which was all he had on deposit, not such wanton or fraudulent refusal to pay holder of check as would make bank liable. 42/244.

Where assignment of deposit made after depositor had given check to a different person whether facts warranted payment of check first, though assignment first presented, was question for jury. 109/682 (34 S. E. 998).

Where check sent to drawee bank, drawer having sufficient funds on deposit at the time to pay it, and it was returned unpaid, this was a refusal to pay, though there was no protest nor wilful dishonor of paper, but refusal due to negligent mistake of employee. In such

case bank liable for temperate damages without proof of special damage. 96/334 (1, 2) (23 S. E. 190); 128/30 (2) (57 S. E. 78).

Verdict for \$200 held not too large. 96/334 (3) (23 S. E. 190).

In suit to recover for wrongful dishonor of check evidence relating to customer's financial credit and standing is allowable though no claim made for special damages. 128/30 (1) (57 S. E. 78).

Forged Check.

Bank cashing forged check not relieved from liability because it did so in good faith, believing from inquiry of person presenting check that he was authorized to sign depositor's name. 85/293 (11 S. E. 616); see 81/597 (7 S. E. 738); 114/683 (40 S. E. 720); see **Savings Banks**.

Where agent having broad power of attorney to collect and pay out money for principal, and generally to attend to principal's business, deposited money to principal's credit and afterwards drew it out on checks purporting to be signed by principal and believed by the bank to be genuine, held that bank was discharged whether checks in fact genuine or not. 57/283 (1).

Bank cannot recover from *bona fide* holder for value money paid on check of depositor to which drawer's name was forged, unless holder negligently contributed to fraud, or conduct tended to mislead drawee, who was free from fault. 17 App. 572 (1) (87 S. E. 825).

Payee of check whose indorsement forged has no right of action against drawee bank because bank, supposing indorsement genuine, charged amount of check to depositor, credited correspondent from whom check received with equal amount, and on discovery of forgery returned check to correspondent and made entries on books cancelling former entries. The check was neither paid nor accepted. 88/252 (14 S. E. 577).

Post-Dated Check.

A post-dated check cannot be paid or certified in advance of its date; drawer does not undertake to have funds in drawee's hands until the time of its date arrives. 8 App. 288 (3) (68 S. E. 1092).

Revocation.

Check in ordinary form may be revoked at any time before bank has paid it or committed itself to pay it. 146/96 (90 S. E. 718).

Bank is bound by notice of revocation, orally or in writing, and liable to the drawer to the amount thereafter paid on the check. 146/96 (90 S. E. 718).

Where debtor turned over to another stock of goods to be sold for benefit of creditors and such other sold them and mailed checks to creditors, after which he was garnished by one of the creditors, he was under no legal duty to countermand the checks, and could not countermand them without incurring liability to holders. 1 App. 628 (57 S. E. 1074).

Where debtor sends check by mail, title thereto remains in

sender until received by creditor, unless creditor instructs debtor to send check by mail. 1 App. 646 (57 S. E. 1033).

Maker of check cannot, in absence of fraud or mistake, countermand payment without incurring liability to payee or *bona fide* holder thereof. 17 App. 482 (1) (87 S. E. 717).

Check, unaccepted, not describing particular fund or using words of transfer of whole or part of amount, not an assignment of money to drawer's credit. 120/714 (48 S. E. 122); 96/254 (2) (22 S. E. 1001) and citations; 146/96 (90 S. E. 718), (98 S. E. 112) (23 Ga. App. 279) (3).

See **Crimes and Misdemeanors; Savings Banks.**

Clearing House.

Component banks of clearing-house entitled to sue collecting bank on dishonored check of such bank, though such bank was partnership. 144/120 (1) (86 S. E. 317).

Manager and cashier of clearing-house association are neither necessary nor proper parties in such action. 144/120 (2).

See **Insolvency.**

Collateral.

Law giving lien upon assets of bank for collections on collaterals constitutional. 147/273 (93 S. E. 880).

Return of collateral pledged not required before payment of debt, even if the transfer was illegal. 19 App. 435 (91 S. E. 509).

Bank is liable to owner for

unlawful disposition by one of its officers contrary to terms of contract, of collateral security held by it. 20 App. 39 (92 S. S. E. 398).

Collections.

Where bank took solvent bill for collection and was instructed to allow it to be renewed, on condition that solvent indorser given, and where renewal allowed without such indorser, bank liable for damages sustained by holder. 59/667 (1).

Law implies contract on part of bank to obey instructions, and on part of bailor to pay reasonable compensation. 59/668 (3).

Acceptance by bank of amount less than called for by draft sent for collection, under special instructions renders bank liable for difference between amount called for and amount remitted. Indebtedness existing between drawer and drawee no defense to bank. 101 S. E. 194 (Ga. App.).

Bank acting only as collecting agent not liable in action for money had and received for amount paid on unauthorized indorsement. 20 App. 811 (93 S. E. 542).

Accepted draft paid by check on collecting bank, which forwarded its own check to drawer and then failed, drawee not liable. 137/23 (72 S. E. 415).

Where drawee has on general deposit with bank sufficient funds to pay draft held by it for collection and instructs the bank to pay it, and the collecting bank agrees to pay it by charging same to his account, the transaction constitutes payment of the draft as between

the drawer and drawee, and the drawee is not liable if the collecting bank subsequently fails although it may have been insolvent at the time, unknown to the drawee. 18 App. 377 (89 S. E. 454). See also, 18 App. 599 (89 S. E. 1094).

Where bank in violation of instructions deposited collections to credit of bank sending notes, and used money, such money was not impressed with trust in favor of sending bank so as to give it priority over general creditors and depositors of collecting bank. 144/490 (1) (87 S. E. 399).

Draft paid; remittance stopped by examiner; priority over general creditors not allowed as to proceeds of draft collected. 146/786 (92 S. E. 625):

Title to drafts and checks deposited for collection, bank to be responsible only as agent for collection, remains in depositor. 15 App. 319 (2) (83 S. E. 149).

Collecting bank holding draft "for collection and credit" is agent of drawer. 18 App. 599 (89 S. E. 1094). See 18 App. 377 (89 S. E. 454).

When check or draft is deposited presumption is that it is deposited merely for collection, unless it is drawn in favor of bank. 15 App. 319 (3).

Mere fact that note was made payable at certain bank, would not, in absence of special circumstances showing such authority, constitute the bank collecting agent for the holder and authorize it to collect same, the bank not being in possession of the note itself. 21 App. 200 (93 S. 7. 1009).

Such an agency might be im-

plied from a previous course of dealings between the parties wherein similar payments had been either authorized or ratified by the principal. 21 App. 200 (93 S. E. 1009).

Credit made by bank in anticipation of collecting paper deposited may be cancelled by bank if paper is not paid. 15 App. 319 (4) (83 S. E. 149).

See **Check**.

Consolidation.

Consolidation of one bank with another requires consent of two-thirds of the stock of each. § 2303, Park's Ann. Code; 22 App. 348 (5) (95 S. E. 1025).

Where bank itself can not discharge its liabilities in due course, directors may borrow money or arrange for payment of such liabilities by another bank. 22 App. 348 (5) (95 S. E. 1025).

See **Directors**.

Corporate Existence.

Where there was nothing to show that bank had ceased to be corporation, its continued corporate existence will be presumed, though there were no returns to State Treasurer nor tax returns to county tax collector. 145/458 (3) (89 S. E. 427).

Crimes and Misdemeanors. **Embezzlement.**

One may be accessory in embezzlement by officer or employee of bank or other corporate body under § 186, Park's Penal Code, who is not himself an officer or employee. 118/799 (3) (45 S. E. 614).

Evidence as to defendant's

straitened circumstances, showing necessity for large sums of money, admissible in indictment against officer of bank for embezzlement. 10/47; but see 108/60, 62 (33 S. E. 829).

Where money of principal is knowingly used by agent for his own private benefit and in violation of duty to principal, intention to restore money not prevent act from being embezzlement. 11 App. 427 (1) (75 S. E. 512).

Fraudulent Insolvency.

Punishment provided by § 204, Park's Penal Code, for fraudulent insolvency of bank does not amount to imprisonment for debt. 7 App. 101 (2), 108 (66 S. E. 383).

Intentional fraud and dishonesty of bank officials punishable under § 204 Park's Penal Code, not mere mismanagement resulting in insolvency. 7 App. 101 (2), 108 (66 S. E. 383).

It was competent for the legislature to legalize as evidence a presumption that the insolvency of a bank was caused by the fraudulent act of the officers directly charged with its affairs and also to place upon such officers the burden of rebutting such presumption. 7 App. 101 (3), 110 (66 S. E. 383); and see 124/15 (5) (52 S. E. 74; 128/668 (5) (57 S. E. 889; 19 App. 36 (3) (90 S. E. 1029).

Either insolvency or failure to redeem bills raises presumption that crime committed in mismanagement of bank. 7 App. 101 (1) (66 S. E. 383).

Burden of proof that trust company named in indictment

is a chartered bank in prosecution for fraudulent insolvency, under § 204 Park's Penal Code is upon the State, and this burden can not be successfully carried unless it appears that the company has obtained a charter authorizing it to exercise the privileges of a bank. 13 App. 314 (9) (79 S. E. 170).

Section 204 Park's Penal Code is not violation of the fifth or fourteenth amendment to the Constitution of the United States, nor of Art. 1, Sec. 1, Par. 3 of the State Constitution. 142/636 (1, 2, 3) (83 S. E. 540; 15 App. 520 (1, 2, 3) (83 S. E. 891); 148/758 (4) (98 S. E. 267).

Within the meaning of § 204 Park's Penal Code insolvency of bank is that condition in which its entire property and assets are insufficient to pay all of its debts, and § 2306 Park's Ann. Code does not furnish a definition of insolvency to be applied in construing that section. 142/636, 637 (4) (83 S. E. 540); 15 App. 520 (4) (83 S. E. 891).

The capital stock of a bank issued and paid for is not a liability that should be included and taken into account in determining the question of solvency or insolvency of the bank, on the trial of one of its officers indicted under § 204 Penal Code. 48/758 (6) (98 S. E. 267).

Solvency or insolvency is matter admitting of opinion evidence. 8 App. 129 (16) (68 S. E. 849); 20 App. 61 (11) (92 S. E. 555).

Immaterial whether bank is bank of issue or not either in prosecution for fraudulent in-

solvency of bank or for declaring fraudulent dividends. 7 App. 101 (1) (66 S. E. 383); 8 App. 129 (3) (68 S. E. 849).

Illegal Dividends.

Evidence to show existence of conditions which made declaration of dividend illegal, for some time prior thereto, is relevant, as tending to establish condition of bank's affairs on day in question, as well as to show opportunities for knowledge of these conditions. 8 App. 129 (10) (68 S. E. 849).

Charter and by-laws may be highest evidence as to who should control bank, yet it is competent for witness to testify that designated person in fact controlled it. 8 App. 129 (11) (68 S. E. 849).

Expert accountant may give summarized statement of what books, containing multifarious details, show provided the books themselves are made accessible to the court and the parties. 8 App. 129 (14) (68 S. E. 849); 20 App. 61 (10) (92 S. E. 555).

Indictment against president or one of directors need not set out the names of other directors not indicted, though they have participated in declaration of dividend; offense of president or director is several rather than joint. 8 App. 129 (2) (68 S. E. 849).

Motives of officers immaterial if they did those acts which are penal under § 208, Park's Penal Code. 8 App. 129 (7) (68 S. E. 849).

Evidence as to transactions had by partnership with bank admissible in connection with other evidence tending to show

defendant was member of partnership. 8 App. 129 (21) (68 S. E. 849).

Worthless Checks.

In order to sustain the validity of § 718 (d), Park's Penal Code, relating to passing worthless checks, it will be construed as requiring fraudulent intent to constitute such an act a crime. 17 App. 811 (1) (88 S. E. 687).

Drawing post-dated check and failure to have funds in bank at date set does not constitute offense of passing worthless check. 17 App. 811 (2) (88 S. E. 687).

See **Insolvency**.

Deed.

Deed made by president of bank and countersigned by cashier was valid, charter providing that all contracts should be signed by president and countersigned by cashier. 17/99; see 134/627 (2) (68 S. E. 436).

Deposits.

In General.

Deposit being general and not evidenced by any regular certificate of deposit or other writing fixing time of payment, statute of limitations not commence to run in favor of bank until demand and refusal, demand not being delayed until right has become stale. 88/333 (14 S. E. 554); see 98/518 (25 S. E. 572).

Bank not liable for interest on funds held on general deposit in absence of special contract therefor. 81/597 (7 S. E. 738).

If bank pays interest to depositors, it may agree with them at what time and in what amounts interest will be paid. 114/788 (3) (40 S. E. 825).

Where vendor of cotton received check in payment therefor, delivered up check, had amount placed in pass book, and took possession of book, sale was complete and relation of debtor and creditor existed between vendor and bank. 66/394.

General deposit of money in bank is loan to bank by depositor and not distinguishable from ordinary loan from one man to another, payable on demand. 52/496; 78/610 (3 S. E. 772); 96/254, 259 (22 S. E. 1001); 126/136, 145 (54 S. E. 977); see 12 App. 488 (77 S. E. 589).

Deposit of money in bank, creates chose in action. 146/447 (91 S. E. 487).

Where A deposits money with direction that it is to be paid on check which he has given or will give to C, the money belongs to A until the bank either pays it or promises C to pay it, unless it be deposited at the instance or procurement of C, or under arrangement with him. 51/325 (2).

Deposits are of two kinds, viz: those in which banker becomes bailee, title remaining with depositor, and those where depositor parts with title and lends money to banker, who, in consideration of use of loan, agrees to refund same amount or any part thereof on demand. 121/278, 280 (48 S. E. 945); see 12 App. 48 (77 S. E. 589).

Statement of account ren-

dered depositor showing balance due him held sufficient evidence of bank's indebtedness to him. 11/434.

Liability of bank to depositors under Scaling Ordinance of 1865. 52/515.

Where money deposited by grandmother was gift from mother to child, whether after notice of that fact to bank, mother's assent to payment of money on grandmother's check could be inferred from fact that bank sent for mother and she and grandmother conversed about the deposit and grandmother's right to draw it out and she did not then or afterwards give notice that she still objected to payment to grandmother, she having previously given express notice of objection, was question of fact for jury. 89/218 (15 S. E. 482).

Deposit by husband in wife's name, with agreement that he might draw it out on checks signed with her name by himself; bank not liable to her for money so drawn. 21 App. 183 (94 S. E. 90).

Absence of entry on books of bank has evidential value as tending to show that no deposit made, where cashier testified that deposit slips were always entered on books on day of deposit. 137/285 (6-a) (73 S. E. 387).

Deposit may be shown by parol proof. 18 App. 654 (2) (90 S. E. 225); 18 App. 610 (89 S. E. 1095).

That deposit not to be entered on books does not necessarily extend the transaction beyond the scope of the cashier's authority and the effect of such transaction may amount

to a deposit in the bank itself. 20 App. 121 (2) (92 S. E. 759).

Title to money placed on general deposit passes to bank the moment deposit is made. 128/577 (1) (58 S. E. 28); see 108/602, 611 (34 S. E. 160); 12 App. 488 (77 S. E. 589).

Where checks deposited by plaintiff in ordinary course of business were credited as cash, and he was entitled to draw against deposit at once, check so deposited became property of bank, which was not entitled to recharge the same on its subsequently becoming lost in the mail in process of collection. 142/236 (82 S. E. 625).

Where draft is deposited by payees in bank other than that on which it is drawn, "for deposit * * * to the credit of" payees, *prima facie* title to draft and proceeds thereof is in payees. 144/181 (1) (86 S. E. 538).

Whether parties intended that title to draft should be in bank in which deposited, rather than in payees, was for jury under evidence here. 144/181 (1) (86 S. E. 538).

Where evidence did not show that title to draft was in plaintiff bank, error to direct verdict for plaintiff. 144/181 (1) (86 S. E. 538).

Title to checks and drafts received on deposit as cash creates relation of debtor and creditor between bank and depositor. 15 App. 319 (1) (83 S. E. 149).

Where parties intend that title to paper shall pass to bank, that bank is understood to have right to charge amount back if

it shall prove uncollectible, will not change relation of debtor and creditor. 15 App. 319 (4) (83 S. E. 149).

See **Bill of Lading.**

Certificate of Deposit.

Certificate of deposit is debt within meaning of charter provision making directors personally liable for indebtedness in excess of given amount. 30/580.

Certificate of deposit payable to order is negotiable, and indorser thereon is liable on his indorsement. 7/84.

Certificate of deposit payable to order is negotiable; not rendered indefinite by condition as to interest payment. 147/637 (95 S. E. 223).

Certificate of deposit payable to order, but indicating no time of payment other than can be inferred from words "interest at the rate of 7 per cent. on call, and 10 per cent. per annum," is payable on demand and due immediately. 56/605 (3); see 64/42 (1).

Certificate of deposit payable to order "on return of this certificate properly endorsed" not due until payment actually demanded. 108/357 (33 S. E. 985); 147/638 (95 S. E. 223).

Certificate of deposit certifying that sum deposited to credit of third person subject to check of such person, and reserving no control to depositor is promise of bank to pay to third person upon presentation of certificate; but if deposit subject to check only on certain conditions, promise to pay depends upon compliance with conditions; general allegation of compliance subject to special

demurrer. 127/448 (56 S. E. 486).

Certificate of deposit is subsisting chose in action and represents fund it describes, so that delivery of it as gift is an equitable assignment of fund for which it calls. 3 App. 742 (1) (60 S. E. 480).

Delivery of certificate of deposit was valid gift *causa mortis*. Subsequent deposit of certificate by donor and giving check for its amount did not affect validity of gift but was means adopted to perfect it. Such check operated as equitable assignment of certificate and therefore of fund it represented. Failure of donee to present check until after death of donor not revocation of gift. 3 App. 742 (2) (60 S. E. 480).

Sending certificate of deposit through mails to party to whom payer had previously expressed an intention to give it is a sufficient delivery to consummate the gift although certificate not indorsed. 18 App. 182 (89 S. E. 161).

Unsigned notation on certificate of deposit that in event of death of the payee it was to be paid to two named parties does not constitute a gift of the certificate where there was no delivery. 18 App. 418 (89 S. E. 492).

Certificate of deposit payable "to order of administrator, 12 months after date, on return of certificate properly indorsed, with interest at the rate of six per cent. per annum. Interest will cease at maturity," is not due until it is returned to bank properly indorsed and payment thereof is actually de-

manded. 145/508 (1) (89 S. E. 516).

Garnishment.

Bank under summons of garnishment receiving deposits of defendant and paying them out on his check, held liable to the garnishing creditor for amount deposited up to time of filing answer. 51/325 (1).

Where agent deposited in bank to his own credit money belonging to principal and creditor of agent garnished bank, principal could file claim affidavit and bond and have the money paid to him on agent's check. 52/494.

Money deposited to credit of "P, agent," could be reached by garnishment at instance of creditor of P, and if bank knew of creditor's contention that money belonged to P individually, it could not, except at its peril, pay the money to the alleged principal. Creditor could not obtain injunction to prevent bank from so paying the money, though the debtor was insolvent. 99/300 (25 S. E. 697).

Deposit of check, in name of one who had received it to take up his note to the maker of the check when the note should be presented by an indorsee, was a trust fund for that purpose, and not subject to garnishment by another creditor. 19 App. 61 (90 S. E. 975).

A principal may follow his money deposited by an agent in the latter's name, and recover the same wherever found, unless the rights of innocent third persons have intervened. § 3577, Park's Ann. Code. 52/497.

Generally payee of bill of exchange indorsing it "for deposit to credit of" himself retains ownership of bill and its proceeds until so deposited and proceeds in hands of collecting bank are subject to garnishment as his assets. 87/45 (1) (13 S. E. 160); see 73/383; 89/108 (3) (14 S. E. 891); 10 App. 716 (74 S. E. 78).

Set-Off.

Against suit to recover balance due on general deposit account, bank may set off matured debt due to it by depositor. 129/582 (2) (59 S. E. 291). See 19 Ga. App. 575 (91 S. E. 904).

But the exercise of this right is optional. Too late to exercise right of set-off after appraisers appointed to set apart year's support to widow of depositor. 12 App. 488 (77 S. E. 589).

Deposit made by debtor of bank in name of "R. & Co." competent for bank to show funds really money of R and claim application of fund to indebtedness. 129/582 (1) (59 S. E. 291).

Bank having money on deposit with another and becoming insolvent, being then indebted to depositary on notes exceeding amount of deposit, depositary could appropriate deposit, though notes not due. 96/254 (1) (22 S. E. 1001).

Fact that bank which owned note failed to exercise its right of set-off and allowed principal debtor to check out all money on deposit not discharge surety on the note. 126/136 (54 S. E. 977).

Bank being payee and owner

of accepted bill, under no duty to acceptor to apply funds of drawer on general deposit to payment of bill. 78/222 (6) (2 S. E. 547); s. c. 79/810 (6) (2 S. E. 547).

State depositary becoming insolvent while indebted to State, and being put in hands of receiver, depositors who are indebted to bank on notes can set off against such notes in hands of receiver amounts due them on their deposits. 94/95 (21 S. E. 146).

Wife of president of bank sued as depositor on overdraft could set off money her husband had collected for her and deposited to his own credit. 108/400 (33 S. E. 987).

Bank's claim against assignee could not be set off against subsequent assignee. 19 App. 575 (91 S. E. 904).

Bank may apply deposit to matured debt due it regardless of depositor's insolvency and of whether he is liable as principal or only secondarily, and though check has been drawn against deposit for money previously collected by depositor for payee. 14 App. 240 (80 S. E. 703).

Where receiver was appointed for bank placed in examiner's hands pursuant to § 2290, Park's Ann. Code, debtor could not by securing transfer to himself of depositor's account after posting of notice have same set off at its face value against indebtedness. 144/78 (86 S. E. 231).

Special Deposit.

By habitually receiving special gratuitous deposits through cashier, national banks will in-

cur liability for gross negligence in respect to such deposits. 58/369 (1).

Bank liable for special deposit of bonds, though acting without pay, stolen by cashier, unless bank shows it did its full duty in selecting such officer, and did not disregard indications of dishonesty. 93/503 (21 S. E. 55); 95/394 (22 S. E. 628).

Special deposit consisting of stocks and bonds, written authority, indorsed on the certificate of deposit to pay out the dividends and coupons, no authority for surrendering the stocks and bonds themselves. 58/369 (3).

Special deposit withdrawn by person with authority from depositor, bank not liable, though neither corporation nor its officer had any knowledge of the authority. 58/369 (2).

Deposit may be for a specific purpose; such a deposit while partaking of the nature of a "special" deposit more accurately falls within a class of its own and may be defined as one in the making of which a trust is constituted with a special duty as to its application assumed by the bank. 21 App. 356, 364 (94 S. E. 611).

A deposit of part of the proceeds of a loan made by the bank under a requirement that such fixed amount be left on deposit with the bank can not properly be regarded as either a special deposit or one for a specific purpose, but is an enforced deposit and renders the loan transaction usurious. 21 App. 356, 365 (94 S. E. 611).

Deposit to pledgee's credit to protect him from possible loss

on account of releasing goods pledged, held to be general, not special deposit, though bank had notice of depositor's purpose. 119/901 (47 S. E. 208).

Bank is agent of debtor to pay over money deposited for creditor. 20 App. 122 (92 S. E. 759).

Deposit by debtor in bank to account of his creditor not constitute payment to creditor, unless he consents to deposit; if made without his consent, bank is merely debtor's agent to pay money to creditor. 116/45 (2) (42 S. E. 475).

See **Bill of Lading; Directors.**

Directors.

In General.

Control of all property of bank is generally vested in directors. 7/196.

Agreement entered into by directors of a bank with a trust company, which assumes all the liabilities of the bank upon a transfer of all of its assets, to indemnify the trust company against loss thereon is enforceable. 22 App. 348 (95 S. E. 1025).

Authority of officers, by resolution of directors, to give notes and collaterals for borrowed money, extended to renewals, where no revocation. 147/273 (93 S. E. 880).

Directors not repudiating legal act of cashier, done for benefit of bank, held that such act was act of the bank. 20/276 (8).

Director had no authority to ratify unauthorized sale by bank's attorney of land belonging to bank. 108/376 (33 S. E. 1003).

Directors are agents of corporation not of stockholders; but if they stipulate for ultimate redemption of bills of bank, if bank be bound by acts of agent, the stockholders are liable upon their special agreement. 18/412 (13).

Benefit from deposit not such as would disqualify director from voting as councilman to make the bank the city's depository. 22/278-9 (4) (96 S. E. 14).

Liability of.

Directors made individually liable for excess of bank's indebtedness over amount allowed by charter, held that their liability was not penal but remedial; joint and not several; and that neither absence nor dissent would relieve director from liability. 18/318 (2); 20/275 (3); 30/580.

Directors not relieved from liability imposed by charter for loss arising from waste or neglect of assignee of bank. 30/580 (4).

Such liability did not expire with expiration of act of incorporation. 30/581 (7).

Directors' liability under charter for excess of debts of bank over given amount was statutory liability and not barred until after twenty years. 30/580; 12/104.

Certificate of deposit is debt within meaning of charter provision making directors personally liable for indebtedness in excess of given amount. 30/580.

Director of bankrupt bank cannot buy up claims against it at a discount and entitle himself to credit therefor at full

face value in settlement with creditors on his personal liability as a stockholder. 60/174.

Notice to.

Notice or knowledge of failure of consideration of note which director sells to bank before maturity is not imputable to bank, where seller acted only for himself and bank was represented by another official. 112/823 (1) (38 S. E. 103).

See **Cashier**; **National Bank**.

Discount.

The import of the word "discount" necessarily carries with it the charging of interest in advance and is within the express granted power of national banks. 21 App. 356, 361 (94 S. E. 611).

See **Accountant and General Manager**; **President**; **Usury**.

Dividends.

Dividends can be declared only out of net profits. 103/145 (1) (29 S. E. 695); 130/515 (5) (61 S. E. 117).

See **Crimes and Misdemeanors**.

Fraudulent Organization.

Fraudulent organization of a bank not set up as defense against payment of an acceptance. 25/534.

Charges in bill that small sum was paid in money for bank stock and balance paid in notes, and that purchasers became president and directors and reported to Governor that one-fourth of stock was paid in, which they knew was un-

true, require answer and explanation. 24/273 (8).

Garnishment.

See **Bill of Lading**; **Deposit**.

Gift Causa Mortis.

See **Deposit**; **Savings Bank**.

Guaranty.

Guaranty by bank solely for benefit of another, *ultra vires*. But agreement to "guarantee" payment of draft, may be original and not a collateral undertaking and binding upon the bank. 19 App. 177 (91 S. E. 251); 22 App. 700 (97 S. E. 205).

See **National Banks**.

Husband and Wife.

See **Married Woman**.

Insolvency.

Where insolvent bank gave a note of one of its customers in payment of a check, instead of cash, it was not necessarily a fraud against creditors and did not constitute a preference. 147/436 (94 S. E. 554).

§ 2360, Park's Ann. Code, prohibiting conveyances and assignments by bank in contemplation of insolvency or after insolvency except for the benefit of all creditors and stockholders has no application against an innocent assignee for value without knowledge of the condition of the bank. 19 App. 271 (91 S. E. 339).

Meaning of notice or knowledge discussed. 107/565, 569 (33 S. E. 802); see 12 App. 186, 189 (76 S. E. 1077).

Depositor or *bona fide* creditor who draws check on the bank or receives effects therefrom without notice of or reason to suspect insolvency is a *bona fide* purchaser. 86/284 (3-2) (12 S. E. 635).

Evidence here authorized holding that trustees of clearing house association were not chargeable with notice of insolvency of bank at time of issuance and delivery to it of clearing house certificates. 132/100 (8) (63 S. E. 907).

Depositor checking out money in regular course of business, without notice of insolvency of bank protected; but if it has notice and bank pays check with intent to create a preference, he is liable to repay difference between amount paid and his pro rata share of bank's assets. 128/577 (2) (58 S. E. 28).

Assignment to pay existing debt not void because amount assigned larger than reasonably sufficient to pay debt and because there is stipulation that excess shall be returned to bank. 10/10 (5).

Preference is unlawful only when transfer is made to satisfy antecedent debt. 132/100, 103 (63 S. E. 907).

Fraudulent transfer by bank in contemplation of insolvency, not made by pledge of collateral, unless for purpose of securing an antecedent debt. 19 App. 435 (3) (91 S. E. 509).

Creditor holding collateral is entitled to share in distribution of assets of insolvent bank on amount of his debt reduced by value of collateral. 147/74 (92 S. E. 868).

Individual liability of stock-

holders to depositors is asset of insolvent bank. § 2249, Park's Ann. Code. 141/227 (3) (80 S. E. 1085); 148/663 (98 S. E. 86); 148/719 (98 S. E. 343); 148/854 (98 S. E. 491).

Capital stock not a liability to be taken into account in determining the question of a bank's insolvency on the trial of one of its officers for the penal offense of permitting it to become fraudulently insolvent. 148/758 (98 S. E. 26).

Stockholder is not a creditor in determining the question of solvency or insolvency. 148/758, 761 (98 S. E. 267); 20 App. 61 (92 S. E. 555).

Receivership, injunction against creditors and other equitable relief, not ordinarily to be granted on suit by directors. But stockholders will not be allowed to complain thereof collaterally in suit brought by receivers to enforce their individual liability to depositors. 148/858 (98 S. E. 491).

Same defenses available against receiver as against bank itself. 20 App. 36 (92 S. E. 397).

See **Crimes and Misdemeanors; Cashier; Deposit.**

Interest.

See **Discount.**

Loans.

Charter provisions limiting amount of loans, requiring two or more good indorsers on notes and bills discounted, and providing that all notes discounted at the bank should be renewed annually, were direct-

ory only, and debt could be collected though contracted in disregard of these provisions. 2/92 (9).

Married Woman.

Where bank did not know or have reason to know that money used by husband in payment of debt due by him to it was money of wife, wife will be bound. 20 App. 220 (2) (92 S. E. 964).

Messenger.

Messenger whose business was only to collect commercial papers, notice to, of dissolution of partnership, not notice to bank. 97/582 (3) (25 S. E. 362).

National Banks.

Comptroller of Currency.

Comptroller of Currency; authority of deputy and of acting Comptroller. 146/118 (90 S. E. 965).

Jurisdiction of State Courts.

Non-resident national bank giving attachment bond could be sued on it in this State in the court to which the attachment was returnable. Service in such suit. 78/449 (3 S. E. 269).

Judgment rendered in State court against national bank, return of *nulla bona* made, and bank ceasing to discharge functions as fiscal agent of United States and disposing of assets among stockholders, injunction granted and receiver appointed. 63/549.

Until receiver appointed by Federal court, neither law nor comity requires State court to suspend its equitable remedy

until former shall act. 63/549.

State court could not entertain stockholders' suit to wind up affairs of national bank, where no other relief is prayed. 143/627 (85 S. E. 881).

Where directors of insolvent national bank undertake to liquidate its affairs and consolidate it with another bank, stockholders' suit attacking such consolidation, but praying no relief against the directors of the absorbing bank, though praying to wind up affairs of liquidating bank, must be brought in Federal court. 143/627 (85 S. E. 881).

National bank, having gone into voluntary liquidation, liable to actions as domestic corporation. 65/603.

Seizure of property belonging to national bank before final judgment, by virtue of any attachment issued under State law, is void, and bond given by bank to dissolve such attachment served by summons or garnishment is also void. 91/264 (18 S. E. 137).

National bank can not be enjoined from selling land under power in mortgage transferred to it. 147/753 (95 S. E. 246).

National bank can not be enjoined from prosecuting suit on note before final judgment. 148/498 (97 S. E. 70).

Powers.

A national bank is a corporation, powers of which are defined and limited by acts of Congress authorizing creation of such banks. 10 App. 270 (1) (73 S. E. 405).

Decisions of the United States Supreme Court are of paramount authority as to pow-

ers and liabilities of national banks. 10 App. 270 (2) (73 S. E. 405).

Government alone is entitled to complain of violation by national bank of National Bank Act. 18 App. 564 (90 S. E. 91).

National bank is not prohibited by National Bank Act from taking mortgage on real estate by way of security on debt previously contracted. 18 App. 564 (90 S. E. 91).

A national bank cannot authorize or ratify an absolutely *ultra vires* act of its agents or officers. 10 App. 270 (3) (73 S. E. 405).

Neither the directors nor officers or agents of a national bank have authority to institute prosecutions for violations of the laws of the State, or to cause requisition papers to be issued for alleged criminals. 10 App. 270 (4) (73 S. E. 405).

National bank, in negotiating its paper, can bind itself for payment thereof by its indorsement thereon; but it cannot guarantee payment of paper of others, or become surety thereon, solely for benefit of latter. 135/614 (1) (69 S. E. 1123). See 18 Ga. App. 151 (89 S. E. 994-999).

National bank could not ratify cashier's act in obtaining from third person a loan to a borrower from the bank of amount greater than that allowed by the Federal statute, and was not estopped to set up invalidity of bank's guaranty of payment by such borrower to the third person, extended by the cashier. 135/614 (2) (69 S. E. 1123).

National bank cannot have

lien on shares of stockholders. 115/608 (1) (41 S. E. 983).

Sale of stock in national bank to pay assessment under Rev. Stat., § 5205, void if price obtained does not equal assessment. 103/851 (31 S. E. 78).

Note given to prevent prosecution for officer's violation of national bank law, void. 19 App. 208 (91 S. E. 346).

Under the National Bank Act, cashiers of national banks hold their office subject to dismissal at the pleasure of the board of directors, and although elected for a fixed term cashier may be dismissed before expiration thereof without cause. 23 App. 441 (2) (98 S. E. 402).

Taxation.

Business of a national bank can not be taxed by municipality. 59/648; see 105/567 (32 S. E. 617).

National banks are not subject to license tax by state or municipalities. 62/645. Tax imposed on presidents of all banks doing business in this State is inoperative when applied to presidents of national banks. 105/567.

Usury.

Section of national banking act providing that debtor who has paid bank more than legal interest may recover twice the amount of the interest paid, construed. 135/687 (70 S. E. 246).

Penalty imposed upon national banks for charging usury is exclusive; law of this State that homestead waiver when part of usurious contract is void, not applicable to national

banks. 112/232 (37 S. E. 381); see 12 App. 472 (77 S. E. 320); 21 App. 356 (94 S. E. 611); 22 App. 58 (1) (95 S. E. 381).

Though no interest collectible where usury charged, plaintiff praying that excess be deducted, and deduction made, defendant can not complain of verdict. 109/573 (1) (35 S. E. 61).

State statutes relating to usury have no application to negotiable instruments held by national banks. Remedy given by Act of Congress against national banks for taking usurious interest is exclusive. 12 App. 472 (1) (77 S. E. 320).

The rule is applicable in all cases where negotiable instrument infected with usury is made payable to such bank originally, or where it has been discounted by the bank, and the bank as holder, is endeavoring to collect the face thereof with knowledge of the usury. 12 App. 472 (2) (77 S. E. 320).

Not usury for national bank to take interest in advance at highest legal rate by way of discount. 21 App. 356 (94 S. E. 611).

Penalty on national banks prescribed by § 4198, U. S. R. S., for the taking of usury can not be recovered unless the usurious interest has been actually paid. 21 App. 356, 366 (94 S. E. 611).

When usury on notes for loan is charged by national bank, the bank can not recover on a renewal note more than amount of original loan, though only legal interest be charged on the renewal. 22 App. 58 (2) (95 S. E. 381).

Limitation of two years, in National Bank Act, applies only to suits for penalty of double the interest paid, and not to defense of usury to defeat recovery of interest; and it begins to run from time of payment. 22 App. 58 (3) (95 S. E. 381).

Set-off not allowed as to alleged interest actually paid national bank, as the only remedy in such case is an action of debt under the National Banking Act to recover twice the amount of the interest paid. 22 App. 58 (4) (95 S. E. 381).

Payment on usurious debt to national bank applied to principal, not interest, in absence of direction. 22 App. 58 (5) (95 S. E. 381).

Attorney's fees for collection, provision for, in note to national bank, not usurious. 22 App. 59 (6) 62 (95 S. E. 381).

A surety or guarantor of a debt to a national bank is not discharged because the bank charged or received usury. 12 App. 472 (3) (77 S. E. 320); 22 Ga. App. 58 (1) (95 S. E. 381).

See **Discount**.

Notary Public.

Notary rightfully employed by bank, bank generally not liable for malicious protest made by; immaterial that notary is also employee of bank. 88/308 (2, 3) (14 S. E. 552).

Notice to Officers When Notice to Bank.

See **Cashier; Directors; Messenger; President.**

Officers of Banks.

See **Accountant and General Manager; Bond; Cashier; Directors; National Bank; President.**

Partnership.

That checks frequently drawn by partnership to discharge individual debts of its members did not constitute such a course of dealing as would justify bank in assuming that it was within scope of partnership business to give its note in satisfaction of debt due by one of the partners to the bank. 114/185 (3) (39 S. E. 920).

Application of collections on collateral securities for debts of partnership to debts of individual partners unlawful. 101/134 (28 S. E. 644).

Pass Book.

Entry on pass book equivalent to a receipt for money, and establishes the relation of debtor and creditor between the bank and the depositor. 58/62.

Pass book given to depositor in savings bank, entries in which are shown to have been made by officer of bank, *prima facie* evidence that bank is indebted to depositor for balance shown by book. 115/939 (42 S. E. 269).

Pass book not conclusive evidence of amount due depositor. 129/582 (3) (59 S. E. 291); 21 Ga. App. 183 (1) (94 S. E. 90).

Where entry in pass book purporting to show that owner of book had credit in bank for specified balance was *ab initio* false and third person contemplating purchase of interest in

owner's business applied to banker for information as to genuineness and accuracy of the credit and the truth was concealed from him and he was defrauded and suffered loss, held that the banker was liable in damages for such loss. 97/673 (25 S. E. 754).

See **Savings Bank.**

Post-Dated Check.

See **Check.**

President.**Powers.**

The president of a bank is its chief executive officer, and, in the absence of any showing to the contrary, will be presumed to be the agent in charge of its affairs. 20 App. 35 (92 S. E. 394).

President of bank has no power to bind it, except in discharge of his ordinary duties; and it is not one of his ordinary duties to release debtors of the bank from payment of their obligations to it. 3 App. 364 (5) (60 S. E. 13).

Ratification of unauthorized release of debtor by president relied on, specific acts of ratification must be alleged; if acquiescence and receiving benefits relied on as estoppel, knowledge by directors and benefits to bank must be alleged and proved; delay in enforcing payment does not show ratification. 3 App. 365 (6) (60 S. E. 13).

Bank president negotiating to third person, for his own benefit, accommodation note payable to cashier and indorsed in blank, not notice to such third person of impropriety or ille-

gality of his conduct. 99/258 (1) (25 S. E. 620).

President of bank, even if clothed with general authority to lend its money, cannot bind bank by lending its funds to himself or to the cashier, when latter knows that the loan is made for the president's own benefit. 126/702, 709 (56 S. E. 55).

Where charter provided that contracts should not bind bank unless signed by president and countersigned by cashier, president sued on his indorsement of bill drawn by himself as president in his own favor could not object to regularity of contract, nor was he protected on his indorsement by want of conformity to the charter. 3/185 (3).

Whether or not note fraudulently altered by inserting after name of payee the letters "Pt." as abbreviation of "president" payment to that person discharged makers, it appearing that even treating the paper as property of the bank of which he was president, he had, as such, full authority to collect the paper in its behalf. 110/780 (1) (36 S. E. 201).

Where president had general authority to take in settlement of paper due it property other than cash, his so doing in particular instance was binding upon bank. 110/780 (2) (36 S. E. 201).

President has inherent power to dismiss suit brought by bank, where his power to control litigation by bank was not limited by statute, charter, by-law, or order of directors. 17 App. 420 (1) (87 S. E. 606).

Notice to.

Notice to president concerning untrustworthiness of cashier is notice to bank, unless president is accomplice of cashier. 93/503, 509 (21 S. E. 65).

While generally discounting of bills and notes is not within scope of duty of president and therefore notice to him would not generally be notice to bank in relation to such transactions, yet where it appears that "officers of the bank" consulted and acted on question whether note should be accepted as collateral, notice to any of such officers would be notice to bank, and in absence of proof as to what officers were in consultation, it might be inferred that president and directors were those referred to. 105/116 (2), 121 (31 S. E. 141).

Knowledge of president of bank that certain stock not fully paid up imputable to bank if he, acting for it, accepted transfer of the stock to it and it thereunder retained same. 110/827 (3) (36 S. E. 256).

Bank not chargeable with notice of facts of which its president acquires knowledge while dealing in his private capacity with third persons; nor is knowledge on his part thus acquired imputable to the corporation when, acting through another official, it deals with him at arm's length. 116/820 (3) (43 S. E. 269); 22 App. 693 (97 S. E. 111).

Depreciation of stock held by bank as collateral, by president and stockholder, with view to purchasing controlling interest in corporation, did not

without more render bank liable in damages. 68/637 (4).

See **Cashier; Deed.**

Ratification.

A bank, by bringing action on contract made in its behalf by officer, ratifies his action in making the contract, and is chargeable with knowledge of whatever he knew at the time of so doing. 113/527 (2) (38 S. E. 947).

See **Cashier; Directors; National Bank; President.**

Savings Bank.

Whether particular bank has shown itself to be a savings bank which pays interest on deposits and whose deposits are not subject to check, held to be question for jury. 114/788 (1) (40 S. E. 825).

"Subject to check" means subject to payment without limitation or restriction, except that the check must be presented on banking days within banking hours. 114/788 (2) (40 S. E. 825).

Savings bank depositor bound by reasonable rules assented to in writing. 121/105 (48 S. E. 708); 99 S. E. 239 (Ga. App.).

Rule that payment to person presenting pass book shall be good, unless book lost and written notice given to bank before payment, is reasonable. 121/105 (48 S. E. 708); 99 S. E. 239 (Ga. App.).

Where person other than depositor presents pass book with forged check bearing signature similar to that of depositor and there is nothing to put teller on inquiry and bank in good faith

pays check, it is not liable. 121/105 (48 S. E. 708).

That depositor is unable to write and signs name by mark no defense to enforcement of this rule. — App. — (99 S. E. 239).

Principle not affected by another rule prescribing that depositors must always present pass book in depositing or withdrawing money and that if not present personally properly executed order must accompany book in case of withdrawal. 121/105 (48 S. E. 708).

Gift of deposit in savings bank consummated by delivery of pass book to donee, with intention to give deposits represented by book, accompanied by appropriate words of gift, without an assignment or transfer in writing. — App. — (99 S. E. 160).

A pass book issued by a savings bank is the record of the customer's account and its production authorizes control of the deposit. — App. — (99 S. E. 160).

Provisions of law in regard to building and loan associations apply to savings banks. § 2881, Park's Ann. Code.

Trust company powers may be acquired by savings banks. § 2821, Park's Ann. Code.

See **Pass Book.**

Set-Off.

See **Deposit; Directors; National Bank.**

Stock.

By-Law Lien.

By-law asserting lien on stock for debts due company

valid as between corporators. 1/43.

Judgment against stockholder inferior to existing by-law lien, though plaintiff had no notice thereof at time he made loan, secured judgment, or gave notice under § 6036, Park's Ann. Code. If stock was subject to lien when rights of judgment creditor attached, and notice was given at sheriff's sale, purchaser could not compel transfer without paying amount due company by stockholder. 122/521 (2, 3) (50 S. E. 279).

Stock, by-law lien on, inferior to lien of pledgee *bona fide* and without notice. Notice given at pledgee's sale not affect rights of purchaser. 147/150 (95 S. E. 286); — App. — (101 S. E. 203).

Notice of lien given in face of certificate, transferee takes subject to debt due by stockholder to corporation or which may become due before corporation has notice of transfer. 120/575 (1, 2) (48 S. E. 226).

Where no reference to lien in certificate pledgee or transferee not affected by terms of by-law of which he had no notice; statement in certificate that "same transferable only on books of the corporation" not charge transferee with notice. 120/575 (3, 4) (48 S. E. 226); — App. — (101 S. E. 203); and see 7 App. 472 (3) (67 S. E. 205).

A bank, the charter of which provides that the total liability to it of any person "for borrowed money * * * shall at no time exceed one-tenth part of the capital stock of said bank paid in," and also declar-

ing a lien on the stock of any stockholder for any indebtedness due it by such stockholder which shall be superior to all other liens, has by virtue of its charter, a lien of highest dignity upon the stock of a stockholder to an amount not exceeding ten per cent. of the capital stock of the bank actually paid in, notwithstanding it may have violated the terms of its charter by loaning to such stockholder a sum largely in excess of that which it was thereby authorized to permit him to borrow. 116/820 (1) (43 S. E. 269).

When stock of bank provides that no assignment of stock shall be valid, as against it, unless a formal transfer of the same be made on its books, it has the right to treat stockholder as true owner, and deal with him accordingly, until it receives notice of the assignment, *aliter*, after notice is brought home to the bank, even though there has been no attempt on his part to secure a formal transfer of the stock upon its books. 116/820 (2) (43 S. E. 269).

By-law lien not attach to stock assigned with knowledge of president and directors for indebtedness to bank incurred subsequently by original holder. 21 App. 620 (4) (94 S. E. 819).

Lien of mortgage on stock is inferior to by-law lien on such stock where debt secured by by-law lien was incurred before notice to the bank of the mortgage of the stock even though debt to bank was created subsequent to mortgage. Record of mortgage is not no-

tice to the bank. 22 App. 688 (97 S. E. 107).

Transfer.

Right of buyer at execution sale to have transfer of stock on books. 147/750 (95 S. E. 286).

Illegal refusal of bank to transfer stock on books of the corporation to owner and holder of certificate renders bank liable for resulting damages. Existence of by-law lien no defense against transferee without notice. — App. — (101 S. E. 203).

See **National Bank.**

Stockholders — Individual Liability of.

In General.

Prior to 1893 there was no general law declaring individual liability of stockholders in banks, and whether such liability existed depended upon provisions of charter in given case. 125/710 (3) (54 S. E. 626); and see 123/787 (51 S. E. 770); 147/548 (94 S. E. 1025).

Provisions of Act of 1894 that individual liability of stockholders shall be considered an asset of the bank and enforced by the receiver applicable to bank previously chartered. 148/663 (98 S. E. 86); 106/556 (32 S. E. 647 (2).

Amount of individual liability of all stockholders limited in charter to their stock and equal additional amount of money, and whole stock amounting only to \$50,000, creditors cannot collect more than that sum from all nor from any one more than his

equal and ratable share. 99/801 (5) (27 S. E. 790).

Holders of certificates of deposit are depositors within the provision of a bank charter imposing on stockholders a statutory liability, in addition to the full payment of the amount of their subscriptions, for the payment of depositors. 141/227, 228 (6) (80 S. E. 1085).

Interest, plaintiff seeking to enforce individual liability of stockholders, entitled to, from date of suit. 125/710 (18) (54 S. E. 626).

Stockholder of bank sued on his ultimate liability on bills of bank liable for interest only from time of demand of payment made on him. 10/162 (2).

Interest will be added to the principal of the deposit, not exceeding the statutory limit, in an action to enforce the statutory liability of stockholders for the payment of depositors. 141/227, 228 (7), (80 S. E. 1085).

Interest begins to run on deposits subject to check from the date of the bank's insolvency and appointment of a receiver. 141/227, 228 (7) (80 S. E. 1085).

Property, individual, of stockholders made liable by charter for ultimate payment of debts, liability is imposed which may result in personal judgment binding all of the stockholder's property at date of judgment and any that may be thereafter acquired; not necessary to allege in petition that stockholder had property, or of what his property consisted. 125/710 (23), (54 S. E. 626).

Value of stock to be estimated according to valuation placed on it by charter, where charter provided that stockholders should be individually liable in proportion to amount of shares held by each and value thereof. 10/162 (3); 11/459 (3).

Directors made liable by charter for overissue of bank notes, individual liability of stockholders was not secondary and collateral to that of directors. 18/444 (3).

Liability of stockholders under charter arises when bank refuses or ceases to redeem bills and is notoriously and continuously insolvent. 92 U. S. 156 (23 L. Ed. 537).

Proportion to amount of shares and value thereof, where stockholders bound in, for ultimate redemption of bills of bank, held that aggregate body of stockholders is bound for all the bills issued by the bank and that as whole capital stock is to entire outstanding circulation, so is each stockholder's share to his part to be redeemed. 19/338 (5); see 19/325 (4); 16/217 (4).

Creditor may recover entire debt out of one stockholder provided the debt does not exceed his proportion of entire indebtedness of company, the individual liability of the charter providing that stockholders shall be liable *pro rata* for debts of company to amount of stock they respectively hold. 56/563 (4).

Transfer of stock by stockholder on transfer book of bank is evidence against him that he once owned stock to amount transferred. 20/275 (1).

In action against stockholder, transfer made on books by cashier, defendant being member at time and free access secured to him, is *prima facie* evidence of his ownership of the shares. 11/461 (16).

Evidence of declarations of officers and agents of bank not competent in fixing ownership of stock. 19/338 (6).

Mere fact that no certificate was to be issued to subscriber for part of the stock for which he subscribed did not prevent him from being stockholder of the entire number of shares, nor relieve him from liability as a stockholder. 140/625, 631 (79 S. E. 536).

Transfer of stock in bank here, though made after failure of bank, did not prevent transferee from being stockholder, and as such from being liable under bank's charter. 126/17 (5).

Charter providing that "individual property of stockholders at the time of suit shall be liable for the ultimate payment of debts of company in proportion to amount owned by each" makes liable only those who are stockholders at the time suits brought against company by creditors. 125/710 (1-7) (54 S. E. 626) overruling cases above cited so far as conflicting; see also 192 U. S. 386 (48 L. Ed. 491, 24 Sup. Ct. 314).

Charter providing that stockholders should be individually liable "to the extent of the amount of their stock, at the par value thereof, respectively, at the time the debt was created, in addition to the amount invested in such shares," held that stockholder was individu-

ally liable for his *pro rata* part of debts created before he acquired his shares by transfer as well as for like part of those created during his ownership of the shares; and that he was also liable for debts created after he transferred his shares, unless he gave notice of transfer as prescribed in § 1496 of Code of 1882, which was of force at the time. 99/801 (3, 4) 27 S. E. 790), affirming 95/505 (22 S. E. 277).

Pledgee holding bank stock as collateral not liable as stockholder for bank's indebtedness created after stock re-transferred on books on payment of loan, though pledgee failed to give notice as required by § 1496 of Code of 1882, stockholder's individual liability under charter being limited to par value of his stock at time debt created. 192 U. S. 386 (48 L. Ed. 491, 24 Sup. Ct. 314).

Collateral security, where stock transferred as, individual liability under charter attached to transferee as well as to one who purchased stock outright. 99/801 (2) (27 S. E. 790).

Individual liability under Act of 1893 not confined to original subscribers or purchasers of stock from the corporation, but extends to transferees of such stockholders. 147/548 (94 S. E. 1025).

One holding stock in an insolvent bank as life tenant is subject to the individual liability imposed by statute upon stockholders for the benefit of depositors. 22 App. 203 (95 S. E. 756).

Discharge of Liability.

Stockholder is discharged when he has once paid the

amount for which he is liable under charter. 18/67 (15), 109, 110; 16/217 (4); 53/502.

Stockholder sued on individual liability may defend by showing that before beginning of suit he paid other depositors than plaintiff an amount equal to full proportion his stock bears to whole amount due depositors. Suit cannot be defeated by paying to other depositors than plaintiff after suit begun. Evidence to prove payment. 42/575; 40/392.

Assignee chosen by corporation and over whom corporation had coördinate control with creditors, not proper to prove in order to screen stockholder from liability, that assets sufficient to pay creditor were turned over to. 19/338 (7).

Suit on notes of bank brought against stockholder individually liable, held that stockholder would be estopped to deny that there had been compliance with terms of charter or that bank had never been legally organized and had no authority to contract. 18/444 (2).

Stockholder who participated in illegal organization of bank cannot, under individual liability clause, maintain suit upon unpaid bills of bank against another stockholder; evidence admissible to show fraudulent manner in which bank put into operation. 19/337 (1); see 18/411.

Director of bankrupt bank cannot buy up claims against the bank at a discount and entitle himself to credit therefor at full face value in settlement with creditors on his personal liability; at least, he cannot do

this so as to defeat action brought before such claims actually applied. Where stockholder sued as such and he defends on such claims, his legal disability as director to purchase at discount may be urged by plaintiff without any allegation in pleadings. 60/174.

Settlement made by billholder with stockholder, amount received not material to ascertainment of proportionate liability of another stockholder. 20/276 (7).

Stockholders not relieved of liability to assessment to pay debts of national bank by delivery of stock certificates to cashier as vendee where transfer not actually made. 146/55 (90 S. E. 467).

Stockholder is relieved of liability to assessment to pay debts of national bank by delivery of stock certificate containing transfer signed in blank to cashier as vendee with instructions to fill blank and enter transfer on books of bank, although transfer not actually made, where cashier is only officer of bank whose duty it was to make such transfer. 20 App. 767 (93 S. E. 284).

Enforcement of Liability.

Not necessary before suing stockholders on individual liability for ultimate redemption of bills of bank, to exhaust assets of bank by legal proceedings. 92 U. S. 156 (23 L. Ed. 537).

Petition need not show character of debt on which judgment founded or other particulars in reference thereto. Stockholder is let into all defenses appropriate to one in his

position and also to all defenses corporation might have set up in suit against it. 125/710 (8-12) (54 S. E. 626) and citations.

Judgment against corporation in favor of creditor not conclusive against stockholder in suit to enforce individual liability. Such judgment establishes *prima facie* amount and validity of debt. When stockholder not party to suit against corporation and had no notice or opportunity to defend in that suit, he may, in suit against himself, set up not only any fact which would absolve him under charter, but any fact which would negative liability of corporation. In suit against stockholder it is only necessary to allege that judgment has been rendered against corporation; judgment, *fi. fa.* and return of *nulla bona* in suit against corporation, was sufficient to authorize billholder of bank to proceed against stockholder personally. 11/459 (3); see 16/217 (3).

Judgment and execution unsatisfied are evidence of insolvency; fact may be established, however, by other evidence, as for example, by assignment and continued suspension of business, or by other notorious indications. 92 U. S. 156 (23 L. Ed. 537).

Ultimate liability of shareholders as fixed by charter here did not attach to judgment against corporation but to the bank bills; and when such liability sought to be enforced, bills had to be set out and described notwithstanding prior judgment or decree for their payment had been rendered

against corporation or its assignee. 61/613 (3); distinguished in 125/710, 725 (54 S. E. 626).

Action by receivers of bank against stockholders held here not to have been prematurely brought, though all the assets of the corporation had not been exhausted. 141/227, 228 (5) (80 S. E. 1085).

Authority from creditors to sue, receiver not required to show. 125/710 (21) (54 S. E. 626).

Proceedings under which receiver appointed need not be exhibited with petition; allegations describing petition sufficient. 125/710 (22) (54 S. E. 626).

Courts of law have jurisdiction on proper petition and proof to render judgment in suit on stockholder's liability. 106/556 (5) (32 S. E. 647); see 19/325.

Parties defendant, all stockholders may be joined as, in one action by receiver undertaking to collect from stockholders on their individual liability. Corporation not necessary party defendant. 106/556 (3, 4) (32 S. E. 647); see also 95/505 (2) (22 S. E. 277).

In suit to enforce individual liability, allegations that some are dead, some beyond jurisdiction, and that others are defunct corporations set forth sufficient reasons for omitting certain stockholders as parties defendant. 125/710 (24) (54 S. E. 626); see 95/505 (2) (22 S. E. 277).

In suit to enforce stockholders' individual liability to depositors, all the stockholders so

liable may be joined in one action. 148/663 (98 S. E. 86).

In a suit of the character just indicated, (a) no demand by depositors as a condition precedent to suit is necessary; (b) the liability of the stockholders need not be actually fixed and determined; (c) the assets, legal and equitable, of the corporation need not have been first completely exhausted; and (d) the action to enforce the statutory liability of the stockholders may be brought at any time within twenty years after the right of action accrues. 148/663 (98 S. E. 86).

Stockholder assessed by Comptroller of Currency for debt of insolvent national bank can not collaterally attack order of assessment. 146/118 (90 S. E. 965).

Limitation period of, for enforcing individual liability of stockholders is twenty years. Where charter provides that individual property of stockholders "at time suit is filed" shall be liable for debt of corporation, period begins to run upon filing of such suit. 125/710 (19, 20) (54 S. E. 626; 148/663 (98 S. E. 86).

Statute of limitations begins to run on individual liability of stockholders to redeem bills of bank from time when bank refuses or ceases to redeem bills and is notoriously and continuously insolvent. 92 U. S. 156 (23 L. E. 537); see 95 U. S. 628 (24 L. Ed. 365); see 88 Fed. 607; s. c., 99 Fed. 635, 40 C. C. A. 22.

Distribution of assets of insolvent bank, rule of, with regard to stockholders individu-

ally liable under charter. 40/392 (5, 6).

Stock assessment where capital impaired, binding; notice by Assistant State Bank Examiner sufficient. 147/636 (95 S. E. 222).

See **Insolvency**.

Stopping Payment.

See **Check**.

Surety.

See **Guaranty**.

Taxation.

State bank is subject to special license or business tax levied by State or municipality. 60/133.

No injunction against arbitration of tax return on suit of person showing no interest. 147/62 (92 S. E. 871).

See **National Banks**.

Telegram.

Probability that drawer of check will request drawee to withhold payment when instructed so to do by payee, and that drawee will comply with such request, is so legally certain as to support action for damages against telegraph company for failure to deliver message from payee to drawer, containing such instruction. 10 App. 716 (4) (74 S. E. 78).

Trust Company.

Provision of § 2817 (12), Park's Ann. Code, is legislative declaration that company organized under the act is not to be regarded as a bank unless it applies for and has granted to it a charter as a bank. 13 App. 314 (6) (79 S. E. 170).

Trust company incorporated under § 2815, *et seq.* of Park's Ann. Code is not a chartered bank, though it exercises as an incident to the main object of its creation power to receive trust funds on deposit and power to lend money. 13 App. 314 (4, 5) (79 S. E. 170).

Trust company may obtain charter as bank, and, after having done so, may exercise, in addition to its other powers, all the functions of a bank. 13 App. 314 (7) (79 S. E. 170).

See **Savings Bank**.

Trustee.

Trustee depositing trust money to his credit as agent may sue for it as trustee. 88/333 (1) (14 S. E. 554).

Check signed by trustee as agent and presented by payee is sufficient demand for repayment of deposit, and upon refusal to pay, trustee's right of action becomes complete. 88/333 (2) (14 S. E. 554).

Not a conversion for trustee to deposit trust money to his credit as agent, though bank may have knowledge of the trust. 88/333 (4) (14 S. E. 554).

Deposit by administrator not properly made when in individual name followed merely by "adm'r:" such deposit treated as individual deposit, rendering the depositor individually liable for money of estate so deposited, when lost by failure of bank. 19 App. 74 (90 S. E. 973).

Payment by bank to trustee on his checks will discharge it, whether checks signed with designation of trustee or not. 88/335 (5) (14 S. E. 554).

Bank not liable to trustee upon contract of deposit, where he checked out trust funds for his own benefit with bank's knowledge. If party to misapplication of trust funds, bank liable to beneficiaries on their equitable title, not on contract of deposit with trustee. 94/356 (21 S. E. 575).

Generally bank may assume that trustee will apply trust money deposited to its proper purposes and is not accountable for misappropriation, but it can not knowingly appropriate to satisfaction of debt due it by another trust funds deposited with it by him after creation of debt. 102/202 (29 S. E. 182).

Bank having notice that breach of trust is being committed by improper withdrawal of funds is liable. Where funds alleged to have been diverted were assets of insolvent corporation deposited by receiver under order of court providing that funds should be paid out

only on checks signed by receiver and countersigned by judge, and bank had notice of order, creditors of corporation could enforce liability of bank incurred by paying out funds upon checks not countersigned as provided. 129/126 (58 S. E. 867).

Where bankers loaned money as agents of a customer, fact that trustee to whom money loaned deposited it in the bank and afterwards drew checks upon it for his own use with the knowledge of the bankers, did not affect their former principal. 66/638 (3-a).

Usury.

Receiving interest in advance by a bank at the highest legal rate of interest on a loan, whether it be a short or a long time loan, is usurious. 143/302.

See National Bank; Discount.



PART III.

**Opinions of the General Counsel of the
Georgia Bankers' Association,
1910-1920.**



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FOREWORD.

Since 1910, as General Counsel of the Georgia Bankers' Association, there have been submitted to me by members of the Association numerous questions of banking law, negotiable instruments, and allied subjects. The questions have come in the form of letters, asking my opinion on statements of fact more or less complicated. To these letters I have replied, endeavoring to base my answer upon recognized authorities from which I have often quoted. I have not undertaken, however, more than a simple statement of the law as I understood it, my purpose being to give to the inquirer an opinion upon which he could act rather than to encumber it with a citation of authority or with a discussion of the principles of law upon which the opinion was based.

Three little volumes of these opinions were published by the Association and distributed to its members. More recently a considerable number of them have been published in *The Southern Banker*, Atlanta, Georgia. From the large number of these opinions published and unpublished I have endeavored to select those which appeared to me of more general interest and which are still applicable, notwithstanding the changes in the law.

For the topics discussed I have no apology. They were selected by the bankers themselves, who desired assistance on problems which confronted them. The opinions do not constitute a systematic treatise on banking law, but attempt to give practical answers to practical questions arising in actual experience of Georgia Bankers. In preparing the manuscript for publication little has been done save to reduce the letters of inquiry to the form of questions, and the replies, to answers to these questions, eliminating as far as possible specific facts and names so as to make the opinions general and impersonal.

The manuscript was prepared by direction of the Executive Council of the Georgia Bankers' Association, it being intended to publish and distribute the book among the members of the Association, as had been done with the previous publications. *Having

undertaken to annotate the Banking Law, it was decided to include the opinions in the same volume.

Lawyers do not need to be cautioned, but bankers may, that these opinions, while for the most part based on authority, are nevertheless the opinions of a lawyer. Whether the Courts would reach the same conclusion on the same state of facts, no one can say. And the layman should also bear in mind that a slight change in the facts often makes the greatest difference in the application of legal principles.

O. A. P..

ACCOMMODATION INDORSERS.

Are Discharged by Extension Except by Consent.

The maker of a note indorsed by two accommodation indorsers applies for an extension, stating that the indorsers have agreed to the extension. The extension is made and interest paid. Before the expiration of the extension the maker fails. Are the indorsers discharged?

This would depend on whether or not they were parties to the extension. The general rule is that any act which would change the contract of an accommodation indorser releases him from liability. An extension of time to a definite date at the instance of the maker would be such a chance in the contract. *Bunn v. Commercial Bank*, 98 Ga. 647. It would increase the risk of the sureties, or at least might have that effect, and they would not be bound. Of course, if the maker's statement is correct, and it can be proved that the indorsers agreed to the extension, they would not be released, since no man can complain of an act to which he himself has assented.

AGENCY.

Bank Must Look to Authority of Agent to Indorse Checks.

A bank cashed a check indorsed by an agent of the payee. The agent had acted as such for some time and it was customary for him to collect for his principal. The agent appropriated the proceeds of this check to his own use. Is the bank liable to the principal?

The rule is, that "when a bank pays a check indorsed by an agent it must assure itself of his authority or accept the consequences of acting without sufficient knowledge, as his authority to indorse can be implied only when such action is needful to perform the duties of his agency effectively. In other cases it must be clearly known to yield the paying bank perfect protection." *Bolles Modern Law of Banking*, p. 730.

If it was customary for the agent to collect for the principal, the bank would be protected in paying the check on his indorse-

ment, and the principal would be estopped from setting up his want of authority. The length of time during which he had acted for his principal and the amount of business of this character done by him would have a material bearing on the question. If it was customary for him to indorse checks payable to his principal and this custom had continued for a considerable period so as to be well known to the principal, the latter could not set up his want of authority. Of course, if this was the first transaction of the kind or if the agent had only cashed a few checks in this way and his principal could not be fairly chargeable with knowledge, the rule would be different.

Deposit in Name of Agent; Liability of Bank to Principal.

Can a traveling salesman, having authority to indorse and collect checks in favor of his house, place such checks to his own account and send his checks to the house?

An agent or traveling salesman, having authority from his company to collect and indorse checks, unless there are some restrictions on his authority as to the purpose for which collection or indorsement can be made or on the manner in which he can handle the funds of the company which he represents, can lawfully deposit such checks to his own credit, especially where checks on his own account are sent to the company. The receipt by the company of the checks and cashing same without objection would be a ratification of the act of the salesman in depositing, even though he had no authority to make deposit to his own credit.

But while a salesman or agent may have the authority so to deposit checks payable to the company, and while the bank would be protected in crediting his personal account with them where they are properly indorsed in accordance with the authority given him, the practice is not to be commended and is a very dangerous one. It is so easy to mix the funds of the company and those of the salesman and the temptation to use the company's money for his own purposes is so great that the practice should be discouraged.

In fact, unless the company authorized the deposit either in its instructions to the salesman or by permitting it to be done and accepting checks without question, I should be inclined to refuse to handle the account in that way. This is not only best for the

bank but for the salesman also; for where hemingles the funds of his principal with his own, the principal would be entitled to hold the entire deposit if the funds could not be separated. Of course if the bank has any reason to suspect that the agent is using the company's money for his own benefit, it could not accept the deposit of the company's money for the account of the agent without becoming liable as assisting him in misappropriating funds.

Deposit in Name of Agent; Liability of Principal for Overdraft.

The agent of a corporation, contrary to instructions from his superior officers, opens an account with a bank under his own name as manager, deposits checks payable to the company to the credit of this account for several months, and draws checks in favor of the employees of the company and other expense items against this account. An overdraft is created, which the company refuses to pay because the agent had no authority to open the account, and because the bank was not authorized to allow an overdraft. Can the company be required to pay the overdraft?

Since an overdraft is simply a loan by a bank to the customer whose checks are paid, the question is whether or not the agent in this instance had the authority to make the loan. It appears that he had no express authority for this purpose, and in fact that he was violating his instructions when he did business with the bank. However, if it can be shown that the company knowingly got the benefit of the money which was paid out on these checks, it would be liable for money advanced for its use and benefit. It could not plead want of authority in its agent to make the loan, where the money was actually used in its own business, and it received the benefit thereof. If the agent carried the account with the bank for a sufficient length of time, and under such circumstances that his superior officers knew or ought to have known that the account was being carried, this, of course, would tend to support the contention that the company had ratified his act in opening the account. If it can be shown that the money was used for the benefit of the corporation, and with its knowledge, the corporation would be liable regardless of any private instructions or understanding which it had with its agent.

Bank Paying to Supposed Agent of Payee Does so at its Peril.

A check is drawn in favor of three payees and is sent to their attorney. Before its receipt one of the payees dies. The attorney, however, indorses the check in the name of the three, and deposits it with a bank to his own account. The bank forwards the check for collection, guaranteeing indorsements. It is advised by its correspondent that the check is paid, but some thirty days afterwards the bank on which the check is drawn advises that the drawer of the check refuses to recognize the indorsement of the attorney, and the check is, therefore, charged to the account of the forwarding bank by its correspondent. Is this bank authorized to charge the check to the attorney? Whose is the loss in the event proper indorsement of the check can not be had?

A check is an order by the drawer on the bank to pay out of the funds to his credit a given amount to a named person. The bank must pay to this person or to his order. It is not authorized to pay to any one else. When, therefore, a bank undertakes to pay to a person who assumes to be the agent of the payee, it does so at its peril, the burden being upon the bank to show that this agent is duly authorized by the payee to indorse the check in the payee's name and collect the amount thereof. Quoting from Michie on Banks and Banking:

"A bank at its peril pays checks drawn upon it to any other than the person to whose order they are made payable. A bank, paying a check upon the unauthorized indorsement of the payee and charging the amount thereof to the drawer's account, is liable to the payee for the amount of the check, unless the payee's conduct excuses such payment or prevents him from asserting such liability." Michie on Banks and Banking, p. 1124.

The Supreme Court of Georgia, in the case of *Atlanta National Bank v. Burke*, 81 Ga. 589, says:

"Where one deposits money in a bank on general deposit, the bank immediately becomes the debtor of the depositor for the money deposited and undertakes impliedly to pay that money either to the depositor or to some person to whom he directs it paid, and in order to discharge itself from this liability to the depositor the bank must pay the money to the depositor or as directed by him. The liability can not be discharged in any other way."

Applying this principle to the facts as stated: The drawer of the check directed payment to the three named payees. The bank had no right, therefore, to pay the check to any one else, although the person presenting it was the attorney-at-law of the payees and may have had an interest in the check on account of his fee. In this instance the attorney could not have been authorized to sign the names of the payees as one of them was dead. The bank having cashed the check without authority did so at its peril, and the correspondent to whom it had guaranteed the in-

dorsement had the right to charge the check to its account, and if the check went through several banks before reaching the bank upon which it was drawn, each one of these in turn would have had the right to charge the check to the account of the bank from which it received it. As between the bank and the attorney, the loss should, of course, fall on the attorney, as he undertook without authority to indorse and collect the check.

I do not think the question of delay in reporting on the check or in objecting to the unauthorized indorsement can, under the facts as stated, make any difference. As I understand it, the drawer of the check refused to recognize the indorsement as soon as the matter was brought to his attention. He did nothing to mislead or to cause the bank or any of its correspondents to change their position. The drawer, therefore, was clearly within his rights when he declined to recognize the indorsement and insisted on the signature of the drawees themselves. The fact that the bank's correspondents accepted the check as cash and advised that it had been paid, I think, makes no difference, as they acted on the guarantee of the forwarding bank that the indorsement was authorized.

Payment of Draft to Messenger of Bank, Who Does Not Produce It, Is at Risk of Payor.

A draft is sent to a bank for collection. It is presented to the drawee by the bank's messenger. The drawee states that he can not pay the draft then, but will do so in a few days. The draft is returned by the bank with the usual notation. A few days thereafter, according to the drawee, he pays the draft to the messenger, who promises to mail him the draft. The messenger denies this, and the bank does not receive the money, and it is not advised of the claim of the drawee that he paid the draft for several months. Is the bank liable to the drawee for the amount which he claims to have paid the messenger?

Section 3578 of Park's Ann. Code provides:

"Where money is due on a written evidence of debt, payment to an agent of the creditor who fails to produce the obligation is at the risk of the debtor. Nonproduction of the security rebuts the implication of authority arising from the agent's employment, and it must be otherwise established."

And the Supreme Court has held:

"If the debtor by promissory note makes a payment thereon to one claiming to be an agent for collection, it is incumbent on the former to see that the latter is in possession of the security; for, if he is not, the debtor will be liable to pay again, unless the person

making the collection had authority to collect the sums due his principal, or the money actually reached the owner." *Walton Guano Co. v. McCall*, 111 Ga. 114.

The Court also held:

"The inference that an agent is authorized to collect a written security for a debt because it is in his custody, ceases when the security is withdrawn by the creditor; and this, even though the debt may have been contracted through the agent.

"If the debtor pay such a claim to one who is not in possession of the security, it is incumbent on him to show that the person receiving payment had authority to collect the debt." *Guilford v. Stacer*, 53 Ga. 618.

From these authorities it seems clear that the bank is not liable, even though the money was actually paid to the messenger, unless the money was turned over by the messenger to the bank. The bank is not liable for the unauthorized act of an agent or employee, unless from a course of dealing or otherwise it has led the party dealing with the agent to believe that the act in question is within the scope of the agent's authority. While a messenger is authorized to collect papers in his hands, and a person paying to such messenger a paper presented to him would be protected in so doing, the failure of the messenger to produce the draft in the case under consideration rebutted any presumption which might otherwise exist that he had authority to collect. It was incumbent upon the drawee of the draft to ascertain the authority of the messenger when the messenger failed to produce the draft. If he had inquired he would have ascertained that the agent did not have authority as a matter of fact, because the draft in question had been returned to the drawer. The agent having no authority to collect and any presumption of authority being rebutted by his failure to produce the draft, the drawee took all the risk of paying, and, therefore, as between him and the bank he will have to lose the amount paid.

Note Signed by Named Party as Agent Is the Individual Undertaking of the Maker.

Can suit be entered against the undisclosed principal and the indorser of a note under seal, the note being payable to a named party with the word "Agent" added and indorsed in the same way?

"An instrument, signed by one as agent, trustee, guardian, administrator, executor, or the like, without more, is the individual

undertaking of the maker, such words being generally words of description." Park's Ann. Code, § 3570.

"It is generally true at common law that a suit could be maintained against an undisclosed principal on a written contract, but there were exceptions to this rule, among which were that undisclosed principals could not be held liable upon a suit upon negotiable instruments, nor upon instruments under seal, and this is now the law as ruled by this and other courts, and announced by many text writers. This is true where the words 'as agent' or 'as trustee' occur after the signature of the maker of a negotiable instrument without disclosing the name of the principal or without sufficiently indicating on the face of the instrument who the principal is." *Coaling Coal Co. v. Howard*, 130 Ga. 807, 811.

This decision of our Supreme Court is abundantly supported by a number of cases cited in the opinion, and seems to be conclusive of the question.

It has been held where credit has been extended to the principal and a note is given signed by the principal's agent that as between the original parties the facts might be shown and the principal held on the contract. *Burhalter v. Perry*, 127 Ga. 438. But this seems not to apply to instruments under seal. *Van Dyke v. Van Dyke*, 123 Ga. 686.

Notes Signed by Administrator Bind Maker Personally, but Do Not Bind the Estate.

Can a note signed by, or an overdraft in the name of an administrator be enforced against the estate for which he is acting? If not, may it be enforced against him personally?

From Section 3570 of Park's Ann. Code, it will be seen that a paper signed by an administrator is generally taken to be the individual undertaking of the administrator on which he would be personally liable, but for which the estate could not generally be held. As a general proposition, an administrator has no authority to borrow money for an estate, and a note signed by him is regarded as his individual undertaking. As an administrator usually has no authority to borrow money for the estate, he could not bind the estate by an overdraft. There may be some circumstances, as for instance, where an administrator is temporarily carrying on the business of the estate under the orders of the court, in which he might have authority to borrow money and bind the estate by a note. In taking such a note it should always be clearly shown that it is an obligation of the estate and not of the administrator.

ATTACHMENT.

Foreign Creditor of Georgia Bank Can Subject Its Account with a Bank in Another State by.

Can a creditor in New York of a bank in Georgia, in order to enforce payment of his debt, attach the Georgia bank's account with a New York bank?

Under the law of Georgia, an attachment may issue against a nonresident and may be served by process of garnishment issued to any one who may be indebted to the nonresident or may have in his possession or control any property, money, or effects of such nonresident. While the process differs somewhat in the different states, in all of them, so far as I am aware, some such means is provided for reaching property of a nonresident, or money due to him, at the instance of a local creditor, and it is not usually necessary to obtain a judgment before beginning such proceedings. Of course, it would not be possible to secure a personal judgment against a nonresident, but any property of such nonresident can be subjected to his indebtedness under the process of attachment and garnishment as above indicated.

Without undertaking to state precisely the procedure in New York, there is no doubt that an attachment could be issued against the Georgia bank and any money due to it by its New York correspondent or any deposit with such correspondent could be seized by garnishment or some similar process.

Amount Paid on Draft, with Order Notify Bill of Lading Attached, Not Subject to Attachment When Discounted by Drawer.

A car of corn was shipped by a dealer in another state on order notify bill of lading to a merchant in Georgia. The bill of lading was attached to a draft which was deposited by the shipper with a bank in that state to his general account subject to check. On arrival the corn was found to be short weight, and the merchant who received it having paid the draft, sued out an attachment against the shipper and served the local bank with summons of garnishment for the purpose of subjecting the fund paid on the draft. The fund is claimed by the bank which discounted the draft, that bank claiming to be the owner. Is the fund subject to the attachment?

The Supreme Court has passed on the question several times. Possibly the best statement is in the case of *National Bank v. Everett*, 136 Ga. 372, from which I quote:

"Where a customer of a milling company orders flour, which is consigned by the milling company to itself with a memorandum on the bill of lading to notify the customer, and contemporaneously the milling company draws a draft for the price of the flour on the customer, payable to a bank, to which is attached the bill of lading endorsed in blank, and deposits with the bank the draft with bill of lading attached, and the amount of the deposit is credited to the depositor's general account and drawn against by him, the bank becomes the purchaser and owner of the draft and bill of lading; and the title of the bank to the flour is superior to a subsequent lien against the milling company."

Under a similar state of facts, the Supreme Court in the case of *Merchants National Bank v. Parker*, 142 Ga. 265, said that "the proceeds of the draft belonged to the bank (which had discounted it) and were not subject to an attachment taken out by the drawee of the draft against the shipper."

Under the facts as stated and under these decisions of the Supreme Court, the fund is not subject to the attachment against the shipper, but belongs to the bank which discounted the draft. I do not think, however, that the local bank would be safe in paying over the fund to the other bank without some understanding from it as to its protection in so doing. The nonresident bank should file a claim to the fund and dissolve the garnishment by giving bond. The local bank should not be put to the burden of proving that the fund belongs to the other bank. Possibly if the latter will agree to be responsible to the former in the event the fund should be held to belong to the shipper, it might be safe for this bank to pay over the fund and answer not indebted on the garnishment. The answer would probably be traversed, and on this traverse the court would have to decide whether the fund belonged to the shipper or to the nonresident bank, and of course the burden would be on the merchant who purchased the corn to establish his contention that the fund belongs to the shipper.

But, as above stated, I think by far the best way to handle the matter is to insist on the nonresident bank's claiming the fund and dissolving the garnishment, taking on itself the burden of establishing its ownership.

ATTESTATION OF INSTRUMENTS.

Employees of bank are not disqualified to attest papers in bank's favor unless pecuniarily interested as stockholders or otherwise.

Can a notary public who is an officer of a bank attest papers in its favor? Can he protest papers handled by the bank?

"A notary public is disqualified from attesting a deed or bill of sale, so as to entitle it to record, if he is pecuniarily or beneficially interested in the transaction.

"A stockholder of a corporation bears such financial relation to it that he is disqualified, on account of interest, from attesting as a notary a deed or bill of sale to which the corporation is a party." *Sou. Iron & Equip. Co. v. Voyles*, 138 Ga. 258.

But an agent or employee of a bank who is not a stockholder is competent as an attesting witness if he has no personal financial interest in the transaction. I quote from a decision by the Court of Appeals in the case of *Stimpson Computing Scale Company v. Holmes-Hartsfield Company*, 6 Ga. App. 569:

"An agent of a corporation is competent as an attesting witness upon a mortgage or other similar instrument executed in favor of the corporation, if he has no personal financial interest in the transaction."

The court in the earlier case of *Betts-Evans Company v. Bass*, 2 Ga. App. 718, says:

"We do not see that a clerk who has no interest conditional upon the profits might not as notary public attest deeds, mortgages, or conditional bills of sale in behalf of his employer, or that a cashier or other officer of a bank who owns no stock therein might not do the same thing, though this would be of doubtful propriety."

But in the case of *Barrow v. E. Tris Napier Co.*, 16 Ga. App. 309, it was held that:

"A mortgage attested by a notary public, who is secretary and treasurer of the corporation to which it is given, is not properly executed, and therefore not admissible for record."

The court cites in support of its decision the Bass case, *supra*, in which case, it will be seen, the court had taken just the opposite view.

The Barrow case is a headnote or memorandum decision, the court not attempting to discuss the question at all. The decision seems to be out of line with other cases decided both by the Supreme Court and the Court of Appeals.

The Supreme Court has decided that a stockholder is not incompetent to act as a nonofficial witness to the signature of the corporation to mortgages or deeds. *Peagler v. Davis*, 143 Ga. 11 (3). And in a recent decision following the Peagler case it was said:

"A stockholder or officer, though incompetent to take an acknowledgment of a mortgage on realty as a notary, because he is a stockholder or officer of the mortgagee corporation, is not incompetent as a nonofficial witness to the signature of the mortgagee. *Peagler v. Davis*, 143 Ga. 11, 84 S. E. 59, Ann. Cas. 1917A, 232." *Hastey v. Roberts*, — Ga. —, 100 S. E. 569.

This is a mere obiter statement. The question is still open so far as the Supreme Court is concerned. But in view of the decision of the Court of Appeals in the Barrow case it is certainly not safe for an officer, although not a stockholder, to attest mortgages or other similar papers in favor of his corporation.

Notary Public in Georgia Not Required to State When Commission Expires.

Must a notary in Georgia, when he attests a paper, state when his commission expires?

There are statutes in many of the States which require such a statement, but there is no such statute in Georgia.

BANKRUPTCY.

Proof of Joint Note Not Necessary to Hold Co-debtor.

Would a bank be safe in not proving in bankruptcy a joint note, where one of the makers is in bankruptcy, the other being solvent and fully able to pay the note?

Section 16 of the Act of Congress establishing a uniform system of bankruptcy is as follows:

"The liability of a person who is a co-debtor with or guarantor or in any manner a surety for a bankrupt shall not be altered by the discharge of such bankrupt."

Mr. Collier, one of the leading writers on bankruptcy, in discussing this section, says:

"It makes no difference under this section whether the creditor proves his claim and gets his dividend. The co-debtor or surety

may protect himself by proving the claim, and can not complain if the debtor [creditor?] does not." Collier on Bankruptcy, 10th Edition, p. 375.

It seems under this authority optional with the creditor whether he proves his claim or not. The joint debtor is not released by the bankruptcy of his co-debtor. While this is true, it would generally seem to be best for a bank to consult the wishes of the solvent debtor. If he desires the claim proved, the bank ordinarily should make the proof and collect the dividend. While it is not bound to do so, proper regard for its customers would seem to suggest that the bank protect them as far as it can by collecting from the bankrupt's estate and thus relieve the co-debtor, at least in part.

Waiver of Right to Go into Bankruptcy in Face of Note Is Not Valid.

Can the right to go into bankruptcy be waived by a provision embodied in the face of a note?

One can not waive his right to go into bankruptcy voluntarily, and certainly he can not make such a waiver as will preclude his creditors from forcing him into bankruptcy if he becomes insolvent; nor can the maker of a note waive as to that particular note the effect of his subsequent bankruptcy. That is to say, a provision in a note to the effect that the note should not be affected by the maker's subsequent bankruptcy, would be invalid. The purpose of the Bankruptcy Act is to protect creditors as well as the debtor. Such a provision in a note if allowed to be effective, would injuriously affect the rights of other creditors than the one holding the note.

Of course, a waiver of homestead in a note is valid, and if the maker of such a note afterwards goes into bankruptcy, he can not then take a homestead as against the holder of the note.

Securities for Advances Made in Good Faith Are Not Preferences, Although Given Within Four Months of Bankruptcy.

A bank advances funds to a customer to pay for cotton to be purchased by him and the customer turns over to the bank from time to time warehouse receipts and insurance policies covering the cotton so purchased. In the event this customer should be adjudged a bankrupt, could the bank

hold the receipts? If the bankruptcy occurred within four months, could the trustee recover the receipts and reduce the status of the bank to that of an unsecured creditor?

Preference implies taking security for a debt already existing. A *bona fide* transaction where security is taken for advances made at the time, does not constitute a preference. The Bankruptcy Act was not intended to prevent the giving of security for money borrowed or advances made, but was only intended to prevent an insolvent from preferring one creditor over another. Where warehouse receipts are turned over to a bank at the time the advances are made, it could hold such receipts, no matter how shortly thereafter the bankruptcy of the customer occurred. Even if it knew that the customer was in bad financial condition, it would be entitled to security for advances actually made, and such transactions where in good faith are not inimical to the Bankruptcy Act and do not constitute preferences within the meaning of that act. *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 60 L. Ed. 275.

Note Waiving Homestead Is a Debt Dischargeable in Bankruptcy.

Will bankruptcy discharge an indebtedness evidenced by a note waiving homestead and exemption under the Constitution and laws of Georgia or of the United States?

Bankruptcy completely discharges all provable debts. A debt evidenced by a note is a provable debt in bankruptcy. Where the bankrupt enters the name of the creditor on his schedule the debt would be discharged by the bankruptcy, and if a suit was entered on the note afterwards the discharge granted by the Bankruptcy Court would be a complete bar to the action.

The waiver of homestead contained in the note would be good, and if the bankrupt claimed a homestead the holder by bringing suit in the State Court could have a receiver appointed, who would take charge of and administer the homestead set apart by the Bankruptcy Court for the benefit of the creditors holding notes waiving homestead; but so far as the debt itself is concerned, bankruptcy would be a complete discharge.

Mortgaged Property Can be Sold by Trustee in Bankruptcy Freed of Lien and Mortgagee Be Paid Out of Proceeds.

Where a bank holds a mortgage on property of a bankrupt, can the property be sold freed of the lien of the mortgage and the bank get its money out of the proceeds?

It is customary after a trustee in bankruptcy has been elected for the trustee to apply to the referee for leave to sell the property of the bankrupt. Where property is covered by a mortgage or other lien, the usual practice is for the trustee to apply for leave to sell the property freed of liens, the liens to attach to the proceeds of sale. I quote from Remington on Bankruptcy, p. 1223: "The property may be sold free from liens and incumbrances, and the liens be transferred to the proceeds." Where this is done, the mortgage creditor can intervene in the bankruptcy cause and have the mortgage satisfied out of the proceeds of the sale.

Under the Bankruptcy Act the trustee can offer the property for sale subject to the lien, but as it is usually best for all parties that the unencumbered title to the property should be sold rather than the equity after the payment of the mortgage, the other practice is generally resorted to. Where this is done, unless it is upon the application of the mortgage creditor or at his instance, he is entitled to receive the full amount of his mortgage debt without the payment of costs, unless the property brings less than the mortgage debt, in which event it is usually taxed with the expenses of the sale.

A Bank Has the Right to Set Off an Indebtedness Due it Against Deposit of a Bankrupt.

Has a bank the right, under the Bankruptcy Act, to set off amounts collected on notes deposited with it for collection as against notes of the depositor held by the bank?

The Bankruptcy Act expressly authorizes the set-off of mutual accounts. This has been repeatedly held to include deposits in bank as against notes of the depositor. There are numerous decisions to this effect. I do not recall a case in which has been decided the precise question as to the right of a bank receiving notes for collection to set-off the proceeds of the collections as against the notes of the depositor, but in the case of *Continental & Commercial Trust & Savings Bank v. Chicago Title & Trust Company*, 229 U. S. 435, 57 L. Ed. 1268, the United States

Supreme Court practically decided the question. I quote the third head-note:

"A balance left in a deposit subject to check for specific purposes may be applied by the bank to the payment of the depositor's indebtedness to it without violating the prohibitions of the Bankruptcy Act of July 1, 1898, section 60 a and b, against preferential transfers, although the transaction was within four months of the bankruptcy proceedings against the depositor, and the bank at the time had reasonable cause to believe him insolvent."

BILL OF LADING.

Railroad delivering goods shipped on order notify bill of lading without requiring surrender thereof is liable to the transferee.

A dealer ships a car of corn on order notify bill of lading and draws draft on his customer, attaching bill of lading to the draft. This draft is discounted by a bank. The railroad by mistake bills the car open, and it is delivered to the customer without the surrender of the bill of lading. Is the railroad liable for such delivery?

"For the purpose of obtaining payment for the goods before delivery to the person for whom they are intended, it is frequently the custom for the shipper, on delivering his goods to the carrier, to take a bill of lading calling for a delivery to his own order and, after attaching a draft drawn upon the person for whom the goods are intended, to forward the same to a bank at the point of delivery where the drawee, on payment of the draft, may secure the bill of lading. When such a course is taken the carrier will be liable to the consignor if loss ensue through a delivery of the goods to the drawee before he has paid the draft and obtained possession of the bill of lading from the bank." Hutchinson on Carriers, § 183.

"The practice is also common in commercial circles for the shipper of goods to take from the carrier a bill of lading providing for a delivery to his own order, and pledge it as collateral security for money advanced upon the faith of its representing the goods. The usual custom in such a case is for the shipper to draw a draft upon the person for whom the goods are intended, attach it to the bill of lading, and secure a discount of the draft by indorsing the bill of lading to a bank. The bank thus becomes the lawful holder of the bill of lading as pledgee and may retain the same in its possession until payment of the draft is made; and if the carrier makes delivery of the goods to the drawee of the draft before he has obtained possession of the bill of lading from the bank, such delivery will be wrongful and the carrier will be liable to the bank as for a conversion." Ibid., § 184.

These two quotations from a recognized authority on the subject correctly state the law as I understand it. On the facts stated the railroad, having delivered the corn without requiring the surrender of the bill of lading and the payment of the draft, would be liable to the bank for having converted the corn, title to which by the transfer of the bill of lading passed from the shipper to the bank.

BOND FOR TITLE.

Rights of Vendor Upon Default.

Can the vendor of land, having given a bond for title, sell the land to another purchaser notwithstanding the fact that the bond for title is still outstanding, the vendee of the land having defaulted in his payments?

A very good general statement of the rights of a vendee of land holding a bond for title, is the following, from Powell's *Actions for Land*, p. 502:

"The vendee under bond for title, * * * * acquires an equitable title to the land, charged with the payment of the purchase money. In substance and apart from the merely formal and strictly legal phase of the matter, he is the owner of the land. The vendor has elected to exchange his land for the promised money represented by the notes given by the vendee. If the property goes down in value, the loss is the vendee's, for he is, nevertheless, bound to pay the notes in full; if it goes up in value the profit should be his. The vendee, therefore, acquires rights which are presumptively valuable and which the law will not lightly forfeit."

Upon the failure of the purchaser holding a bond for title to pay his installments as they mature, it is the right of the vendor to reduce the purchase money notes to judgment, file a deed, and sell the land, or he can bring ejectment against the vendee to recover the land. If the land is vacant the vendor can reenter and take possession of it. But if the vendor reenters and takes possession of the land, he thereby elects to rescind the trade, and there is then an implied obligation on his part to restore to the purchaser the amount of the purchase money which he has paid, less such an amount as would prevent actual loss to the vendor by reason of the vendee's nonperformance of the contract, and if the vendor does not return the purchase money already paid the vendee can recover it from him by suit. *McDaniel v. Gray*, 69 Ga. 434.

As a general rule time is not of the essence of a contract, but it can be made so by agreement. This applies to bonds for title as well as to other contracts. Quoting again from Powell's Actions for Land, p. 502:

"Bonds for title generally contain a condition that they shall be void if the purchase money notes are not paid promptly at maturity. Such a condition is in the nature of a penalty or an agreement for a forfeiture. Ordinarily time is not of the essence in a contract, and penalties and forfeitures are not favored. Usually the measure of the damage flowing from the failure to pay money promptly at maturity is the interest thereon. Therefore, except in rare cases where time is expressly made of the essence of the contract, when the vendee defaults in his payments his interests in the land do not *ipso facto* terminate, the condition of the bond to the contrary notwithstanding. He may, nevertheless, pay the purchase money with interest."

In this connection it should be noted, as said by Judge Powell (Actions for Land, p. 503, note 3) :

"Even in cases where time is made of the essence of the contract, a waiver of the vendor's right to enforce a forfeiture of the vendee's privilege of paying up and keeping the land will be readily presumed and enforced by the courts. Any effort on the part of the vendor to insist upon the payment of the purchase money after the time set in the contract will be construed to be a waiver. If the vendor is going to rescind for lack of promptitude of performance on the vendee's part, he himself must manifest his election so to claim by acting promptly; else he will waive his right to do so."

So, that even in a contract where time is made of the essence the vendor must act promptly upon the failure of the vendee to pay, and if he makes any effort at all to collect the money due after it is due he waives his right to insist upon a forfeiture by the vendee.

Even where time is of the essence and the vendor has the right to declare a forfeiture by the vendee, it would be necessary for the vendor to return to the vendee the money which he had already paid under the contract.

Where it is expressly provided in the bond for title that time shall be of the essence of the contract and that if the notes are not paid at the time specified the obligation shall be void and of no effect, and possession shall be surrendered upon demand, the vendor would be entitled to declare a forfeiture in case the notes were not paid at maturity, provided he had done nothing toward collecting the notes after they became due. Then if the vendor takes possession of the land and returns to the vendee the pur-

chase money paid, he can convey the title to a third person. But it would be decidedly safer, if not necessary, for him to get possession of the bond for title, and it would probably be better to insert in the bond a statement that, in case of default, the vendee is to surrender the bond as well as the property. In the event this is done, I think the title conveyed would be good.

Of course, the ordinary method provided in the Code could be adopted to clear the title of the outstanding bond and recover possession of the property:

"In cases where a contract to purchase has been made or bond for title made, or the purchase money has been partly paid, or in cases where a deed to secure debt has been executed and the purchase money or secured debt has been reduced to judgment, by the payee, assignee or holder of said debt, the holder of the legal title, or, if dead, his executor or administrator, shall without order of any court make and execute to said defendant in *fi. fa.*, or if he be dead to his executor or administrator, a quit claim conveyance to such real or personal property, and file and have the same recorded in the clerk's office, and thereupon the same may be levied upon and sold as other property of said defendant and the proceeds shall be applied to the payment of such judgment; or if there be conflicting claims, then the same shall be applied as determined in proceedings had for that purpose." Park's Ann. Code, § 6037.

Under this section, suit is filed on the notes covered by the bond, judgment obtained, a quit claim deed to the vendee filed and recorded, and the property levied upon and sold by the sheriff as that of the vendee. At the sale the vendor can buy it in or have some one do so for him. If the proceedings are regular and in accordance with the statute, he can then convey a good title to a third person.

Method to Be Pursued by Vendor in Recovering Possession of Land Under Bond for Title Upon Default in Payment.

When the holder of a bond for title has defaulted, what is the quickest way in which the vendor of the property can recover possession?

If the bond contains the provisions discussed in the foregoing opinion and the owner complies with the conditions therein stated, possession could be obtained at once, otherwise there is no legal way in which it can be obtained except through the regular processes of the court. Probably the simplest way is to bring suit on the notes, secure judgment, and after filing and recording a deed to the purchaser, levy on and sell the land. Where

a person enters into possession of property under a bond for title, he can not be summarily dispossessed by a dispossessory warrant or other similar summary remedy. *Griffith v. Collins*, 116 Ga. 420.

When Holder of Bond for Title Executes and Delivers a Mortgage on the Land Described Therein and Subsequently Transfers the Bond for Title, the Lien of the Mortgage Is Superior to the Lien of the Transferred Bond.

The owner of land secures a long loan on the same, executing a deed to secure debt to the lender and taking a bond for title. He then gives a second mortgage covering the same property. This mortgage is recorded. Afterwards he transfers his bond for title as security for a debt. Which security takes precedence, the second mortgage or the transferred bond for title?

It is well settled that "the assignee of a bond for title acquires all the rights and equities to which the assignor was entitled thereunder." *Walker v. Maddox*, 105 Ga. 254.

But in this case the obligee in the bond for title, that is, the original owner of the land, has already mortgaged or incumbered his equity or interest in the land described in the bond, and the transferee of the bond, the mortgage having been recorded, had notice of this incumbrance at the time he took the bond as security. He would, therefore, I think, take subject to the rights of the mortgage creditor. The Supreme Court has practically decided the question, holding as follows:

"Where land is conveyed by deed to secure a loan, bond for title being given for a reconveyance to the debtor upon payment of the debt, and the latter transfers the bond to another, who pays the debt and takes a reconveyance from the creditor, the right of a mortgagee to enforce his mortgage, given upon the land by the debtor after the execution of the security deed, depends, in the absence of an attack upon the *bona fides* of the transfer of the bond for title, upon whether the mortgage antedates the transfer." *Rountree v. Finch*, 120 Ga. 743.

In the opinion in this case the court says:

"If the bond was transferred to her prior to the execution of the mortgage, then, of course, she took the title unencumbered by the mortgage. It was, therefore, essential to petitioner's case that the petition should show that the execution of the mortgage antedated the transfer of the bond for title."

This clearly implies that the converse of the proposition is true, that is, that if the mortgage was given prior to the transfer of the

bond for title, it would be superior to the rights of the transferee.

The Supreme Court has also held that the transfer of a bond for title is superior to a judgment against the owner of the land, and that the judgment creditor does not have the right to subject the land to the payment of the judgment after the payment of the secured debt by the transferee of the bond and the cancellation of the security deed, it not being shown that the holder of the judgment was a creditor when the transfer was made. *Burney Tailoring Co. v. Cuzzort*, 132 Ga. 852.

These cases both hold that the right of the transferee of the bond is superior where the transfer is made prior to the mortgage or judgment, and the implication is strong that if the mortgage or judgment were older than the transfer of the bond, they would be superior to it.

BY-LAWS.

Election of Directors Are Governed by.

Is a by-law valid which requires a two-thirds vote of the stockholders to elect a board of directors?

Such a by-law provision with regard to the election of directors is most unusual. The statutes relating to banks and other corporations require in some instances that two-thirds and sometimes three-fourths of the stockholders must concur in order to authorize amendments to the charter or other fundamental changes in the corporation, and it is not unusual in charters granted by the superior courts to provide that the stockholders by a two-thirds vote may dissolve the corporation, accept amendments to its charter, or do other things of like character. But while it is unusual to provide by the by-laws that a two-thirds vote of the stockholders shall be required for the election of directors, there is no reason why such a provision can not be made. The law certainly does not fix the number of votes or the proportion of stockholders required, and, therefore, the matter is left to the stockholders themselves, who may make any limitations on their own rights which they may deem fit and proper.

In the recent work of Machen on the Modern Law of Corporations, § 1240, it is said:

"A majority of the members present, provided they be a quorum, and unless a heavier preponderance be expressly required

by statute or the company's regulations, determines the action of the meeting."

Quoting from the Supreme Court of Pennsylvania:

"A corporation is a voluntary association of persons engaged in a common enterprise. When the methods of voting are not fixed by general law, the corporators may make the law for themselves, subject to the qualification that such laws and regulations as they make shall not conflict with the laws of the State or of the United States. [The by-law regulation in this case was that the stockholders should have one vote for each share of stock up to ten, and a certain proportion beyond that number. The court continues.] This is a reasonable regulation, it is uniform in its operation, it conflicts with no law, and it is binding on all the stockholders." *Detwiler v. Commonwealth*, 18 Atl. 990.

I see no reason, therefore, why the stockholders cannot adopt a by-law which requires a vote of two-thirds in order to elect directors; and such a by-law when regularly adopted would become the law of the corporation by which all stockholders would be bound.

Lien Created by By-law Cannot Be Asserted Against Holder Without Notice Thereof.

Is the stock of a corporation upon which there is a by-law lien good collateral security in the hands of an innocent holder, no notice being given to such holder that the corporation reserves said lien?

A by-law lien cannot be asserted on stock in the hands of an innocent holder who had no notice of the lien. Section 3375 of Park's Ann. Code provides that such lien "is binding upon the corporators themselves, and upon all creditors giving credit with notice, or purchasers at public or private sale purchasing with notice." It has been held by the Supreme Court that notice of the lien is essential to render it valid as against a creditor. I quote from the decision in the case of *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575:

"Where notice of a by-law lien is given in the face of a stock certificate, the transferee takes subject to any debt due by the stockholder to the corporation at the time of the transfer, or which may arise before the corporation has notice of the transfer of the scrip.

"But where the certificate makes no reference to the existence of the lien, a pledgee or transferee of corporate stock is not affected by the terms of a by-law lien of which he has no notice.

"A statement in a stock certificate that the same is 'transferable only on the books of the corporation, in person or by attorney, on

surrender of the certificate' does not charge the transferee with notice of what is on the books of the company, or of the existence of the lien, or of the fact of the stockholder's indebtedness to the company."

This decision and the section of the Code seem to settle the question.

Transferror of Stock Subject to By-law Lien Is not Liable to Criminal Prosecution.

Is a stockholder transferring as collateral to a third person stock upon which there is a by-law lien, liable to prosecution for making the transfer?

I do not think a stockholder transferring as collateral stock upon which there exists a by-law lien would be subject to a criminal prosecution at the instance of the bank or corporation. It would take a statute to make such a transfer criminal, and I know of no statute on the subject.

By-law Lien Does not Affect Purchaser at Judicial Sale Unless He Has Notice.

A stockholder owes the bank in which he holds stock. The by-laws of the bank create a lien on its stock in its favor. The stock certificate makes no reference to the by-law lien. What are the rights of the bank under its by-law lien as against a purchaser of the stock at a judicial sale under a f. fa. obtained against the stockholder before he bought the stock?

The provision of law applicable is as follows:

"The by-laws of a corporation may create a lien upon the shares or other property of the stockholders in favor of the company; such lien is binding upon the corporators themselves and upon all creditors giving credit with notice, or purchasers at public or private sale purchasing with notice." § 3375 Park's Ann. Code.

It will be seen from this section that the rights of the purchaser of the stock at the sheriff's sale depend upon whether or not he had notice of the by-law lien. Of course, if the bank gave him notice at the sale that it had a lien upon the stock, or if he acquired notice in any other way, then he would buy subject to the lien of the bank. If, however, the purchaser had no notice prior to the sale, by reference in the stock certificate or otherwise, that the by-laws of the bank gave it a lien on the stock, his rights would be superior to the rights of the bank under its lien.

Note.—Under § 88 of the Banking Act of 1919, (§ 10, Art. 8), a bank incorporated under that act can not retain or enforce a lien on its stock by by-law or otherwise except for unpaid installments due thereon.

CASHIER.

Has no Power by Virtue of His Office to Bind Bank by Contract Except in the Discharge of His Ordinary Duties.

Has a cashier power to bind a bank by ordinary contracts made on its behalf by him?

The power of a cashier to make contracts for a bank is rather fully stated in Michie on Banks and Banking, p. 737, from which I quote:

"In order to bind the bank by any contract that he may make, the cashier must keep within the usual and apparent scope of his authority. Without special authority from the board of directors, express or implied, he can not make for his bank a contract in regard to a subject matter outside the usual and customary business of the bank, and outside the business usually performed by cashiers. The actual powers and duties of the cashier, like those of all other agents, may be more or less qualified, restricted or enlarged by the corporation, institution or party for whom he acts. Any restriction upon his usual and customary authority, to be binding upon third persons dealing with the bank through him, must be brought to their knowledge, for where a party deals with the cashier of a bank in good faith, without notice of any want of authority on his part, and the act done is within the apparent scope of his authority, the bank is bound by the contract. On the other hand, contracts not within the scope of the powers ordinarily incident to the office of a cashier will be binding upon the bank where authority to enter into such contracts on behalf of the bank has been expressly conferred, or where he has been held out to the public as having such authority by a previous course of dealing. In short, any contract is binding on a bank, made by its cashier acting within the reasonable or apparent scope of his authority, or made by him when acting with the knowledge and approval of the directors, or like others which he had been accustomed to make with their approval, or that was afterwards ratified by the bank's availing itself of the benefits of such contract. And where the directors of a bank allow the cashier to take the general charge and management of the business and contracts of the bank, all his contracts made within the scope of the powers of the bank are binding upon it."

On page 742 of the same work is the following succinct statement of the power of the cashier of a bank to bind it by a contract for the payment of money:

"A cashier of a bank has no power, by virtue of his office, to bind the corporation except in the discharge of his ordinary duties, and the ordinary business of a bank does not comprehend

a contract made by a cashier—without delegation of power by the board of directors—involving the payment of money not loaned by the bank in the customary way."

These quotations state the rule as generally accepted and answer the question.

Cashier Has no Authority to Draw Checks on Bank's Correspondents in His Own Favor.

Is it legal for a cashier to draw on the bank's New York correspondent, making the check payable to himself individually?

It is a general and well recognized rule that an officer can not occupy a dual position and represent both himself and the bank in any transaction with it. Thus, though a cashier or other officer may have power to make loans for the bank, he can not lend to himself, and it has been held frequently that a cashier can not certify a check payable to himself, and that where he attempts to do so there can not be a *bona fide* holder of such check. I quote (substantially) from Michie on Banks and Banking, p. 1172:

"Where the face of the check shows the officer's attempt to use his official character for his private benefit, every one to whom it comes is put upon inquiry, and when the certificate is false no one can recover against the bank as a *bona fide* holder."

This principle is applicable to the bank's checks drawn in favor of the cashier. While the cashier may have authority to draw checks on the bank's correspondents, he would not have authority to draw checks for his own benefit, and any one taking such a check would do so at his own risk, being put on inquiry by the fact that the officer drawing the check appears to be acting in his own interest in so doing.

While I have found no case in which the precise question has been decided, nor any discussion of it by the text writers, the principle stated, which is well established in the case of dealings between bank officers and the bank, undoubtedly controls.

Cashier can not Make Certificate of Deposit Payable to Himself.

What would be the legal status of a time certificate of deposit issued by a cashier to himself for which no deposit was made and no entry whatever made on the books of the bank? Would the fact that the certificate is signed by the cashier and made payable to his own order be

sufficient to put another bank on notice and prevent it from being a *bona fide* holder of such certificate?

Under the principles stated in the foregoing opinion, a cashier cannot issue a certificate of deposit payable to himself and there can be no *bona fide* holder of such a certificate.

Of course the directors of a bank might give to the cashier authority to certify his own check or to issue to himself certificates of deposit, and this authority might be given by implication by recognizing his certification or his certificates for a considerable period of time. Where such authority is given, either expressly or by implication, the bank might be compelled to pay a certificate although it was fraudulently issued. But where no authority had been given in any way and the certificate of deposit was issued without any deposit having been made, I do not think the bank would be liable or that any one taking the certificate could claim successfully to be a *bona fide* holder.

CASHIER'S CHECK.

Good in Hands of Bona Fide Holder Although Obtained by Misrepresentations.

A bank issues its cashier's check, which the payee cashes at another bank. The bank cashing the check forwards it to the bank on which it is drawn. This bank refuses payment, on the ground that the check was obtained by misrepresentation. Can the bank which cashed the check collect it from the bank which issued it? Would suit have to be brought first against the original payee, who indorsed the check?

A cashier's check is a negotiable instrument, and like other negotiable instruments is not subject to defenses between the original parties where held by a *bona fide* purchaser for value without notice of such defenses. There is nothing peculiar or sacred about a cashier's check. It stands on the same footing as the check of an ordinary person, the drawer being liable where the check is in the hands of a *bona fide* holder. A bank could not plead as against such holder that its cashier's check was obtained by false representations. Of course, if the circumstances were such as to arouse the suspicions of the purchasing bank and to indicate that there was something fraudulent in the transaction, the bank would not be a *bona fide* holder.

It is not necessary that suit should be brought against the indorser before suing the drawer of a check. Indeed, the drawer

is the party primarily liable, and while both can be sued in the same action, it would be proper to exhaust the drawer before going on the indorser, though it is not necessary that this should be done.

CERTIFICATE OF DEPOSIT.

Certificate of Deposit of Insolvent Bank Ranks as General Deposit.

Do certificates of deposit of an insolvent bank rank as deposits? Is there any distinction between certificates of deposit and general deposits, in the payment of dividends?

The Supreme Court has held that the holders of certificates of deposit are depositors within the meaning of the statute, imposing on stockholders a statutory liability for the payment of the depositors. *Lamar v. Taylor*, 141 Ga. 227 (6). Under this decision, there is no distinction between certificate holders and general depositors. Dividends should be paid on all deposits whether represented by certificate or by pass book, *pro rata*, without distinction or priority.

NOTE.—Under the Banking Act of 1919, § 2, the term "depositor" includes the holders of demand and time certificates of deposit lawfully issued.

Deposit in Name of Husband to Be Paid to His Wife in the Event of His Death Must Be Paid to His Administrator and not to Wife.

A person deposits a sum in bank, taking an interest-bearing certificate of deposit, payable to the order of himself, or in the event of his death, to his wife. The depositor dies intestate. Can the widow draw the money on the certificate, or can the money be drawn only by the administrator of the depositor?

I quote from *Michie on Banks and Banking*, Volume II, p. 1283:

"A certificate of deposit payable to the order of the depositor or his wife may be paid to the wife. But where the depositor deposited money in a bank and received a certificate of deposit payable to the order of himself, or his wife, on the return of the certificate, the bank is liable for paying to the wife after notice of the death of the depositor; and notice to the paying teller is notice to the bank."

This statement is based on the case of *Second National Bank v. Wrightston*, 63 Md. 81.

The precise question has been decided by the Court of Appeals of New York in the case of *Sullivan v. Sullivan*, 56 N. E. 116. I quote the headnotes in this case:

"The deposit of money in a bank, and the issuance of a certificate payable to the depositor, or, in case of her death, to another, do not, where there is no consideration therefor, constitute a valid contract between the depositor and the bank for the benefit of the other, which the latter can enforce on the depositor's death before the sum is withdrawn.

"The deposit of a fund in a bank, and the issuance of a certificate payable to the depositor, or, in case of her death, to another, do not create a trust in favor of the other, where there is no intention, express, or implied, to immediately transfer the title to the fund to the latter or to the bank, except as the depositary and debtor of the depositor."

The Supreme Court of Iowa in the case *In Re Brown's Estate*, 113 Iowa 351, 86 N. W. 617, also decided that a certificate issued jointly in the names of the depositor and his wife, the depositor stating to the bank at the time that the certificate was so taken to enable the wife to draw the money on his death, did not create a trust in favor of the wife, and that the fund belonged to the husband's estate.

I do not think the question has been decided in Georgia, but the principles upon which the cases above referred to were decided are well recognized in this State.

Of course, a special contract based on a valid consideration might be made, by which the title to the deposit would pass to a third person, and the bank under such circumstances would be authorized to pay regardless of the death of the depositor. Again, a husband might make a valid gift to his wife in the form of a deposit in bank, which she could draw after his death. In such case, however, it would be necessary that the title to the fund should vest in the wife at the time the gift is made, and not at the death of the depositor. A gift to take effect at the death of the donor can only be made by will, and a bank could not be appointed an agent to transfer to another a deposit after his, the depositor's death, because death would revoke the agency.

NOTE.—Under the Banking Act of 1919, § 183, when a deposit is made in the names of two persons, payable to either or the survivor, the deposit may be paid to either whether the other be living or not.

Certificate of Deposit Should not Be Paid Without Production and Surrender of Certificate.

The payee of a time certificate payable to order dies before its maturity. Can the administrator of the payee enforce payment of the certificate without producing and surrendering it?

The bank should decline to pay the amount until the certificate is produced and delivered. The certificate being payable to order is negotiable, and if it should have gotten into the hands of an innocent holder before its maturity, payment to the administrator of the deceased holder would be no protection. If the administrator cannot produce the certificate, the bank should decline to pay it unless it is established in the way provided by law. Before a lost paper of this character could be established the court would require satisfactory proof that the certificate was, in fact, lost, and that it had not been transferred and was not in the hands of an innocent holder. And a bond sufficient to protect the bank in the payment would be required. This is the only safe course to be pursued under the circumstances.

Bank Must Know Signature of Payee of Certificate of Deposit.

Is a bank bound to know the signature of the payee of a certificate of deposit issued by the bank itself?

A bank is bound to know the signature of the payee of a certificate of deposit. I quote from Magee on Banks and Banking, p. 377:

"It (a certificate of deposit) must be paid to the owner. The instrument being transferable, if presented for payment by a person other than the person named in the certificate as payee, the bank must, before payment, satisfy itself that the transfer and assignment is genuine, that the signature is the signature of the payee named in the certificate. The bank is held to the same degree of care in payment of a certificate as it is in payment of checks. If it pays a forged check, the money is not transferred. If the assignment on the certificate is a forgery, the true owner of the certificate can recover."

And it has been held that "a bank is bound to know the handwriting of the payee of a certificate of deposit issued by it, and is liable for all forged signatures accepted as genuine." *Stout v. Benoist*, 39 Mo. 277, 90 Am. Dec. 468. In this case, which seems to be in line with the rulings of the courts of last resort in other States, it is said that "considerations of convenience and public

policy imperatively demand and require this rule. Bankers have the means in their own hands, by acquiring an intimate knowledge of the signatures of their customers, of protecting and securing themselves against impositions and forgeries. They alone possess the means of knowing, when paper is presented to them, whether the signatures or indorsements are genuine. And if these means are not employed, it is evidence of a neglect of duty which the public has a right to require of them for its safety."

Bona Fide Holder of Certificate of Deposit Is Protected.

A bank is a *bona fide* holder of a certificate of deposit issued by another bank. The issuing bank is garnished as a debtor of the person to whom the certificate was issued after the first bank acquires the certificate. How can the bank holding the certificate protect itself?

The bank, as the purchaser of a negotiable instrument without notice, holds the same superior to any equities which may exist between the issuing bank and the original holder of the certificate, and would be protected against a garnishment sued out against such holder. If the issuing bank refuses to pay the certificate on account of the garnishment, the other bank can claim the money in the garnishment proceedings and have the garnishment released by the filing of a claim bond. There would be no risk in giving such a bond under the circumstances, and this would be the simplest and certainly the quickest way of getting the money on the certificate. The issuing bank would probably be justified in refusing to pay the certificate so long as the garnishment is outstanding and undissolved, as it would not feel like assuming the burden of deciding whether the other bank is a *bona fide* holder.

CERTIFICATION OF CHECKS.

Check Can Not Be Certified by Telephone or Telegraph.

Can a check be certified by telephone or telegraph?

I direct attention to a few of the leading authorities on banking:

"The act by which the bank places itself under obligation to pay to the holder the sum called for by a check must be the expressed promise or undertaking of the bank signifying its intent

to assume this obligation, or some act from which the law will imperatively imply such valid promise or undertaking. The most ordinary form which such an act assumes is the acceptance by the bank of the check, or, as it is perhaps more often called, the certifying of the check. A check is not an instrument which in the ordinary course of business calls for acceptance. The holder can never claim acceptance as his legal right. He can present for payment, and only for payment. But on the other hand there is nothing in the nature of a check which intrinsically precludes its acceptance in like manner and with like effect as a bill of exchange or draft may be accepted. The bank may accept if it chooses; and it is frequently induced by convenience, by the exigencies of business, or by the desire to oblige customers, voluntarily to incur the obligation. * * * The law in England used to allow parol acceptance; but the Statutes, 1st and 2d George IV, and 20th Vict. require an acceptance in writing. Some of the States of the Union have enacted laws to a similar effect. In New York a statute requires acceptance of a bill of exchange to be made in writing, and the courts have held that a check is so far like a bill of exchange as to fall within this statute, and that the verbal promise of the bank to pay it is of no effect." Morse on Banks and Banking, §§ 404, 407.

"When the statute of a State does not provide that an acceptance of a bill of exchange or check shall be made in writing, a verbal acceptance, when proved, is good. * * * The courts say that it is fully settled, both in England and in the United States, that in the absence of a statute an oral acceptance of a bill of exchange will bind the acceptor." Magee on Banks and Banking, § 197.

This quotation is taken from a general discussion of certified checks:

"An acceptance is generally in writing, and in some States such an acceptance is required by the statute of frauds; otherwise this may be done verbally." Bolles on the Modern Law of Banking, p. 699.

The statute of frauds of Georgia requires the acceptance of a bill of exchange to be in writing. § 3222 (8) Park's Ann. Code.

The Supreme Court of Georgia has not been called on to decide whether or not the certification of a check must be in writing, but all the authorities treat the certification of a check as practically the same as the acceptance of a bill of exchange, and the courts generally have held that where the statute of frauds requires the acceptance of a bill of exchange to be in writing, the certification must also be in writing.

Whatever doubt may have existed on the question was removed by the Act of 1907 (Park's Ann. Code, § 2301, reenacted in the

Banking Act of 1919, § 181), which provided that "Such certification shall be entered on the face of such check, draft or order." Certainly since this act there can be no certification by telephone or telegraph.

Agreement Among Banks to Certify by Telephone.

Can the banks of a particular city make an agreement that certification of checks by telephone, by the proper officers, shall be as binding on the banks as if the certification was in writing?

I do not think banks can certify in this way. The certification of a check, as I understand it, is more than an agreement to pay. In effect it is a statement by the bank that the check is genuine and that the drawer has sufficient funds on hand to meet it, as well as an agreement on the part of the bank to pay the check. I do not see how a bank can certify, technically, without seeing the check, as it cannot possibly know whether the check is genuine. But I see no reason why the banks of a particular city might not agree to make themselves liable one to another to pay checks of their customers when requested to do so by telephone. They could undoubtedly make themselves liable to pay under such an agreement. What position a bank under such circumstances might occupy with the depositor is another question. The depositor might take the position that the bank had no right to certify a check unless the check itself was presented for the purpose, and that, having no right to certify, it would have no right to charge the amount to the depositor's account. I am inclined to think that the bank could hold a sufficient amount of the deposit to cover checks which it had agreed to pay in this way, but the difficulty can be readily appreciated. On the whole, such certification being irregular and unauthorized, I doubt whether the convenience would justify the banks in making such an agreement as that suggested.

It would seem better for the banks to agree among themselves to a *quasi* certification subject to prior withdrawal by the depositor, the certification being also conditioned upon the paper being genuine and regular in all respects. What a bank generally wants to know is whether the customer has the money to his credit at the time the question is asked, and I think the banks might agree to give this information; but I do not believe it would be best to enter into a binding obligation to pay the check unless it is certified regularly.

Payment Can Not Be Stopped on Certified Check.

Can payment be stopped on a certified check?

The certification of a check makes the bank liable for its payment, and relieves the drawer of all obligation thereon. The check is immediately charged to the drawer's account, and to all intents and purposes is paid so far as he is concerned. He would not have the right to stop payment on such check, and as the bank by certifying the check becomes primarily liable for its payment, and as it has the funds with which to pay it, it is hard to imagine any circumstance which would authorize the bank to stop payment. This does not mean that there might not be some circumstances under which a bank would be authorized to refuse to pay a certified check. For instance, if the person getting the check certified was guilty of some fraud on the bank, the bank would be authorized to refuse payment so long as the check remained in the hands of the fraudulent holder. I understand the question to be, however, whether the drawer of a check can stop payment after the same has been certified. As stated, the drawer is no longer liable on the check and has no control over it.

Notice by Drawer to Payee that Payment Would Be Stopped Would not Prevent Bank from Certifying.

A gives a check to B in connection with a business transaction between the two. A becomes dissatisfied and notifies B that he (A) is going to stop payment on the check. B gets to the bank before A does and has the check certified. Can the bank be compelled to pay the check thus certified?

The law requires that as soon as a check is certified it shall be charged at once to the drawer's account. The check then becomes the primary obligation of the bank. The drawer cannot stop payment of it, and the bank is liable for it to the same extent that it would be if it was the bank's own check. The fact that the drawer may have told the payee that he intended to stop payment would not change the situation at all, the check having been certified by the bank without any notice of the drawer's intention to revoke or stop payment. Nor would the fact that the check was obtained by fraud, or that the original transaction out of which it was given was fraudulent, make any difference.

I do not think the bank could do otherwise than pay the check when presented.

Payment Can Not Be Stopped on Check Certified After Business Hours.

If a bank certifies a check after business hours, can the drawer stop payment on it?

I know of no reason why a bank may not certify a check after business hours, nor any reason why the drawer of the check has any more right to stop payment on a check issued after banking hours than he has on one issued during such hours. The certification of a check as between the bank and depositor is equivalent to paying the check, and there is no reason why a bank cannot pay a check out of banking hours. Certainly if a bank can pay a check out of business hours, it would have the right to do what is equivalent to its payment. Of course a bank is not obliged to certify or pay a check after banking hours. It has a perfect right to transact all of its business within such reasonable hours as it may fix, and its customers, or other parties dealing with it, have no right to insist on any business being transacted except during these hours; but I do not think there is anything in the contract between the depositor and the bank which would require the bank to fix certain definite hours and transact business only within those hours.

Drawer Has Right to Stop Payment on Check After Bank Has Notified Payee by Telephone or Telegraph that Check Is Good, but Before It Is Paid.

Where a bank has wired its correspondent that the check of a given party for a given amount is "O. K.," but before payment the drawer notifies the bank not to pay the check, is the bank authorized to hold the amount and pay the check in spite of the notice to stop payment, and can the drawer of the check hold the bank liable for so doing? Would bank be liable to holder for refusing to do so?

I quote from Michie on Banks and Banking, p. 1101:

"An ordinary, uncertified check on a general account is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually paid or accepted by the bank on which it is drawn. After acceptance or payment, however, by the bank, the drawer's right of revocation is lost."

This is the generally accepted rule. It is also generally recognized that a check can only be certified in writing, and must be actually presented to the bank for that purpose. I quote again from the same author, p. 1171:

"A parol representation by a bank that a check drawn on it is 'all right' is not equivalent to a certification, and binds the bank to nothing more than that the statement was true at the time it was made. While an affirmative answer by the bank to a general inquiry whether checks of a person named, for a specified sum, are good, is information that such person has on deposit, subject to check, money to that amount, it does not constitute a certification of, or otherwise create an obligation on, the bank to pay checks which the inquirer may then hold."

I do not think the telegram to the bank's correspondent that the check was "O. K." is equivalent to certification or that it rendered the bank liable to pay the check when presented. Therefore the drawer of the check had the right to stop payment at any time before it was actually paid, and if the check was paid in spite of his direction not to pay it, the bank would be liable for such payment. This is true even though the check actually reached the drawee bank through the mail before the drawer gave notice to stop payment. The mere reception of the check could not be treated as payment. If it had been charged to the drawer's account, or if the bank had actually remitted for it, of course, payment could not be stopped, but the mere receipt of the check without more could hardly be regarded as payment.

Having no authority to charge a check certified in this manner to the drawer until the check is actually presented and paid, the bank would not be liable to the holder of the check unless it had made itself liable by a direct and positive promise to pay the check, not on the theory of certification, but because it had itself assumed a direct obligation. Whether or not such liability exists would depend upon the promise made. Merely stating that the check was "O. K." or "good" would not be equivalent to a promise to pay the check at all events, but is only intended to mean that the drawer had sufficient funds on deposit at the time stated to cover the check and that if the check was presented in due course it would be paid out of the funds of the drawer provided, of course, that those funds should remain to his credit until the actual presentation of the check.

It will be seen, however, that a bank runs considerable risk in advising its correspondents and others that checks are good, and that they will be paid. Any communication of this character should always be carefully guarded so as to clearly indicate that the bank assumes no direct responsibility, and that it does not undertake to protect the check in the event the drawer should stop payment or check out his balance.

CHECKS.

Drawee Bank Has Generally no Right to Recover of Payee Money Paid on Forged Check.

Can a bank, which has paid a check drawn on it to one of its depositors, charge it back to his account when the check is discovered to have been a forgery?

The general rule, supported by the weight of authority, is thus stated in 2 Morse on Banks and Banking, p. 80:

"A bank cannot recover money paid on a forgery of the drawer's name, from the person to whom it was paid. The bank is bound to know the signature of the drawer."

This rule is recognized as the law in Georgia by both the Supreme Court and the Court of Appeals. Ga. R. R. & Banking Co. v. Love and Good Will Society, 85 Ga. 293; Swan Edwards Co. v. Union Savings Bank, 17 Ga. App. 572.

Formerly the courts enforced this rule strictly, and when a bank paid money on a forged check or gave another customer credit for a forged check deposited with it, the loss was held to be the loss of the bank and it was not permitted to recover the money from or charge the check back to the customer depositing it.

There has been a tendency, however, in the later decisions of the courts to relax the stringency of this rule, on the ground that it is unreasonable to require the bank to know at all events the signature of its depositor and to make the loss fall on the bank regardless of the circumstances. The conduct of the party for whom the check was cashed and his actual loss are now considered in determining the question of ultimate liability.

"The rule that a drawee is presumed to know his drawer's signature, and hence cannot recover back money paid through a mistake of fact upon a bill to which the drawer's signature was forged, is not available in favor of a holder who by his own negligence contributed to the success of the fraud practiced, and whose conduct had a tendency to mislead the drawee, who was himself free from fault." Woods v. Colony Bank, 114 Ga. 683 (2).

In the case cited a draft, and not a check, was involved but the rule seems to be the same. The court cites with approval a Massachusetts case where it was held that

"The responsibility of the drawee who pays a forged check, for the genuineness of the drawer's signature, is absolute only in favor of one who has not by his own fault or negligence con-

tributed to the success of the fraud or to mislead the drawee; and if the payee took the check, drawn payable to his order, from a stranger or other third person, without inquiry, although in good faith and for value, and gave it currency and credit by indorsing it before receiving payment of it, the drawee may recover back the money paid." *Bank v. Bangs*, 106 Mass. 441.

The Court of Appeals of Georgia states the law as follows:

"A bank is presumed to know the signature of one of its depositors, and, therefore, cannot recover from a *bona fide* holder for value money paid by the bank upon a check to which the drawer's signature was forged, unless it appears that the holder by his own negligence contributed to the success of the fraud practiced, or his conduct had a tendency to mislead the drawee which was itself free from fault." *Swan Edwards Co. v. Union Savings Bank*, 17 Ga. App. 572.

The question whether the party receiving payment of the check would be actually injured in the event he were forced to make it good is also material. The rule covering this phase of the question as well as the one above discussed is thus stated in 2 Morse on Banks and Banking, p. 86:

"If the payee, holder, or presenter of the forged paper has himself been in default, if he has himself been guilty of a negligence prior to that of the banker, or if by any act of his own he has at all contributed to induce the banker's negligence, then he may lose his right to cast the loss upon the banker. * * * The interesting question has now come to be, whether or not the payee has done his full duty, or if he has, and the negligence is with the bank alone, whether the payee will be worse off by correcting the error than if payment had been refused."

The rule, therefore, as at present enforced by the courts seems to be that although the bank is bound to know the signature of its depositors, it is not liable in paying a forged check where the holder of the check by his negligence has in any way contributed to the perpetration of the fraud or where he will not be injured in case the bank is allowed to recover back the money paid.

NOTE.—The Banking Act, § 188, provides that no bank which has in good faith paid a forged or raised check and charged the same to a depositor's account shall be liable to the depositor unless the depositor shall notify the bank within sixty days after his pass book is balanced that the check is a forgery.

Drawee Bank Paying Forged Check of Customer Can Not Recover of Merchant who Accepted the Check in Due Course of Business Though from Unidentified Stranger.

A customer of the M Bank, accepted as cash two checks drawn on L Bank and signed by W. These checks were deposited by C in the M Bank, and on the same day were transferred by the M Bank to the F Bank, which bank undertook to collect from the L Bank. On the following day they were presented to the L Bank and by that bank charged to the account of W, and the F Bank was given credit for them. Fifteen days after the L Bank had accepted the checks as genuine and charged them to its customer's account, the L Bank notified the F Bank that the checks were claimed to be forgeries. The F Bank promptly notified the M Bank, and the M Bank as promptly notified C. C takes the position that inasmuch as the bank on which the checks were drawn accepted them as genuine and the party who issued the checks has in the meantime been lost sight of, the money cannot be recovered back notwithstanding its guarantee of the endorsement when it negotiated the checks. C explains that the checks were given to it in due course in payment for work done by a person who represented himself to be W and who it had every reason to believe was W. On whom should the loss fall?

The position of C seems to be sound and he cannot be required to make the checks good. It follows, of course, that neither the F Bank nor the M Bank can be required to make good the checks, and that the L Bank cannot charge these checks back to the account of the F Bank.

The rule is fully discussed in the preceding opinion.

The L Bank had the right to refuse to pay these checks when they were presented. Having paid them, it cannot now deny the genuineness of the signature. C was not bound to know W's signature or the identity of the man who represented himself to be W. It had the right to take these checks and present them to the L Bank, directly or indirectly. When that bank by paying the checks represented to C that the signatures were genuine, C had no further interest in the matter. Certainly, after fifteen days had passed and C's customer had been entirely lost sight of, it would be an injustice to require C to lose the amount of these checks.

The relaxation of the rule that a bank must know its depositor's signature is in cases where the party presenting the checks for payment is himself in some way a party to the forgery or knows that the checks are forged, or has acted in bad faith, or has been so grossly negligent that his conduct has had a tendency to mislead the bank on which the checks are drawn. Nothing of that kind appears in this case.

A merchant doesn't have to require that his customers be identified. If the L Bank had promptly denounced the checks as forgeries, C might have been able to collect his money out of

the drawer. It seems that there was little if any negligence on C's part, but that there was negligence on the part of the L Bank in paying the forged checks.

Drawee Bank Can Recover Amount Paid on Forged Check of Illiterate Where Signature (by mark) Is Witnessed by Person Cashing Check for Stranger.

At the request of a merchant, a bank telephoned to another bank in a neighboring town, asking whether or not the check of a particular party was good. The bank replied that it was. On the strength of this information, the merchant cashed the check, which was forwarded in due course to the bank upon which drawn, and the forwarding bank credited with the amount. Some days later the drawee bank in making settlement with its customer is advised that the check is a forgery. The check was signed by the drawer's mark, which was witnessed by the merchant, who had no personal acquaintance with the drawer. Can the bank upon which the check is drawn charge the check back to the forwarding bank?

The forwarding bank handled this check in the due course of business, and there were no suspicious circumstances surrounding the transaction so far as it was concerned, and it had no reason to suspect that the check was not genuine. If this is the case, as between it and the bank upon which the check was drawn, the loss would have to fall on the drawee bank. It seems, however, that the merchant did not exercise proper caution in cashing the check. He should not have accepted the check, of one who could not sign his name, without having the party positively identified. The drawee bank was doubtless misled by the fact that the merchant witnessed the drawer's signature, and it was on the strength of the fact that the signature was so witnessed that the check was paid. Therefore, as between the merchant and the drawee bank, the loss should properly fall upon the merchant rather than upon the bank. In a leading case, it was said:

"Where a loss which must be borne by one of two parties alike innocent of the forgery can be traced to the neglect or fault of either, it is reasonable that it should be borne by him, even if innocent of any intentional fraud, through whose means it has succeeded. To entitle the holder to retain money obtained by a forgery, he should be able to maintain that the whole responsibility of determining the validity of the signature was placed upon the drawee, and that the vigilance of the drawee was not lessened and that he was not lulled into a false security by any disregard of duty on his own part, or by the failure of any precautions which from his implied assertion in presenting the check as

a sufficient voucher the drawee had a right to believe he had taken." *Danvers Bank v. Salem Bank*, 151 Mass. 280, 24 N. E. 44.

Under this rule, which seems to be generally recognized, the merchant, not having exercised proper precaution before cashing the check and having misled the drawee bank by witnessing the signature of the drawer, should bear the loss rather than that the bank should do so.

Bona Fide Holder of Check Protected.

A bank cashed a check drawn by a responsible person on a bank in a neighboring town. Before mailing it to its correspondent for collection, the bank was advised by the drawee bank that the bank and the drawer of the check had been garnished for all money due the payee of the check. Was the drawee justified in refusing to honor the check when it was subsequently presented?

I understand from the question that the bank actually parted with the money called for by the check, and that it did not simply receive it from the payee for collection. If so, the paying bank is a *bona fide* holder for value of the check, and the drawee bank was not justified in refusing to pay it.

A check is a negotiable instrument like a note or bill of exchange, and the holder of a check who takes it *bona fide* and for value is just as much entitled to protection as is the *bona fide* holder of a promissory note or other negotiable instrument. The courts are loath to interfere with the rights of *bona fide* holders of any form of commercial paper. Negotiable instruments play an all important part in the world of commerce, and it is most essential to safeguard the rights of those who take them for value and without notice, in the ordinary course of business.

The paying bank is, therefore, entitled to have the check paid by the drawee bank. If a bank upon which a check is drawn could refuse to honor it under such circumstances, a bank would never be safe in cashing a check though received by it in the usual course of business.

I quote from *Fourth National Bank v. Mayer*, 89 Ga. 108:

"Where a regular customer of a bank deposits with the bank his draft payable to his own order and indorsed, 'For deposit to the credit of' the drawer, and the same is entered to his credit on the books of the bank and forwarded by the bank to another bank for collection, the drawer, by the course of dealing, having the right to check against such deposit and in fact checking against

it, and his checks being honored, the title to the draft passes to the first bank, and when collected by the second, the proceeds are not subject to garnishment at the instance of a creditor of the drawer, such proceeds being the property not of the drawer but of the first bank."

The facts of this case are somewhat different from those stated in the question, but the principle is the same. When a bank cashes a check for the payee, title to the check passes to it, and it cannot be interfered with by garnishment served upon the drawer and the drawee to hold up the funds of the payee.

Drawer of check payable to bearer is liable to *bona fide* holder for value, though check may have been lost or stolen.

A bank issues its check on its New York correspondent. The payee indorses it in blank and delivers it to another holder. The check is lost or stolen while in the possession of this holder. It is then indorsed by another person, presumably the person who found it, and in due course and for value comes into the hands of an innocent holder. As soon as the loss of the check is discovered, the owner notifies the bank and requests it to stop payment, which is done. The check is presented to the drawee in New York, and payment refused under instructions, and the check is protested. After stopping payment the bank issues a duplicate, which is paid. The holder of the original check is now demanding payment of the bank as the drawer of the check. Is the bank liable?

The fact that the check in question is a cashier's check or that the check is the check of a bank on its correspondent makes no difference. The bank is in the same position as any other drawer of a check, and is liable to the same extent as any other drawer would be. In answer to the question, I quote from a few of the leading authorities.

"If a check be lost by the lawful owner thereof, and subsequently come into the hands of a *bona fide* holder for value and without notice, he will be entitled to receive the amount from the bankers. If they refuse to pay him, by reason of instructions to this effect given them by the drawer, the holder may recover the amount from the drawer." Morse on Banks and Banking, § 395.

"Although the robber or finder of a negotiable instrument can acquire no title against the legal owner, still, if it be indorsed in blank, or payable or indorsed to bearer, a third party acquiring it from the robber or finder, *bona fide*, for a valuable consideration, and before (but not so, if after) maturity, without notice of the loss, may retain it, as against the true owner, upon whom the loss falls, and enforce payment by any party liable thereon, upon the principle that, whenever one of two innocent persons must suffer by the act of a third, he who has enabled such a third person to

occasion the loss must sustain it." Daniel on Negotiable Instruments, § 1469.

"A man may draw his check in complete form and leave it upon his desk. It may be blown from the window and picked up on the street, or a thief may enter and carry it off. There is no actual delivery in such a case. But, if the check happens to be drawn payable to bearer, so that it may be disposed of without forging the payee's indorsement, and it is negotiated to a holder in due course, or is paid by the drawee bank without negligence, a valid delivery is conclusively presumed and the drawer will be held liable." Brady on The Law of Bank Checks, § 26.

"Where the payee of a bank check indorses it in blank and it is lost, he cannot recover of the bank for paying it to a *bona fide* purchaser, though he had notified the bank of its loss." Michie on Banks and Banking, § 146.

It will be seen from the above that under the facts stated, the bank would be liable as the drawer of this check, the check being in the hands of a *bona fide* holder for value in due course of business, although it may have been lost or even stolen from an intermediate holder.

Bank may Require the Signature to a Check of an Illiterate Depositor to Be Witnessed.

Is there any law which requires the mark of an illiterate person used as a signature of a check to be witnessed by some party other than the payee, and is a bank justified in refusing to pay a check and in protesting the same where the mark is witnessed by the payee?

Under our Code "signature or subscription includes the mark of an illiterate or infirm person." § 5, Park's Ann. Code.

There is no requirement that such a signature be witnessed, and the Supreme Court has held that a signature by mark is good though not witnessed. While this is true it is a reasonable requirement that such a signature should be witnessed. I quote from Magee on Banks and Banking, p. 310:

"The place of the signature is immaterial, provided it appears to have been intended as a signature. It may be written in pencil. Or it may be printed or stamped. Or it may be the drawer's mark. In which case, however, when executed by the maker by mark, it should be executed in the presence of an officer of the bank, or witnessed by a person who could, if called upon by the bank, verify the authenticity of the check."

This is in line with the other authorities on the subject.

As a bank has no way to determine whether or not a check signed by the depositor's mark is genuine unless it is witnessed by

some person whose signature is known to the bank, and as it is responsible to the depositor in the event it pays a forged check, the bank would have a right to decline to pay a check signed by the depositor's mark which was not witnessed by a person whose signature was known to the bank, unless the genuineness of the check was in some other way established. Where payment of a check is refused for any reason the indorsers are relieved unless protest is made and notice given as required by the statute. Therefore, where a bank is obliged to decline to pay a check because it is signed by the depositor's mark, and there is nothing from which the bank can determine whether or not the check is genuine, it would be proper to protest the check.

When an illiterate person opens an account the bank should agree with him at the time that his checks must be witnessed by some officer of the bank or some other person with whose signature the bank is acquainted. While it is unusual to require that these checks be witnessed by someone other than the payee, such a requirement is not unreasonable, for if the payee is the only witness to the genuineness of a check there is a considerable temptation to forge the drawer's signature, and the bank would, of course, have the right to protect itself against this risk.

I have not been able to find any case in which the question has been decided, or any discussion of the question by any writer on the subject of banks and banking, but on principle it seems to me that the bank would be justified in declining to pay a check of an illiterate depositor signed by his mark, where there was no other proof of the genuineness of the check than the attestation of the payee, particularly where the bank did not know the signature of this attesting witness.

Where Depositor's Balance Is Insufficient to Pay Check in Full, the Safer Rule Is for the Bank to Decline to give any Information as to the State of the Account and Refuse to Allow the Holder to Deposit Difference.

Where a depositor gives a check which overdraws his account, can the payee deposit to the credit of the drawer a sufficient amount to bring the depositor's balance up to the amount of the check, and would the bank be authorized to pay the check out of a deposit made up in this way?

The precise question does not seem to have been decided by any of the courts so far as I have been able to find. The nearest ap-

proach to it is a case decided by one of the lower courts in Philadelphia, where it was held:

"Where the payee of a bank check offers to take a smaller sum than the amount called for, the bank should pay to him whatever funds the drawer may have to his credit and indorse the payment on the check." *Bromley v. Commercial National Bank*, 9 Phila. 522.

This case is referred to by most of the writers on banks and banking.

The general rule is thus stated by Michie on Banks and Banking, § 140 (5):

"A bank is under no obligation to pay anything on a check to the drawee or holder when the drawer has not sufficient money on deposit to his credit to pay the check in full, and can not be held liable in an action by the payee or holder thereof. A check for a greater amount than one has on deposit does not pass to the holder any title to the deposit, nor does it create a lien upon or give the payee a right to the actual balance, until the bank has agreed to pay it *pro tanto*."

However, Michie also says, on the authority of *Bromley v. Commercial National Bank*, above cited:

"Where the payee of a bank check offers to take a smaller sum than the amount called for, the bank should pay to him whatever funds the drawer may have to his credit, and indorse the payment on the check."

Morse on Banks and Banking, which is an old standard authority, says:

"If the bank has not funds enough to the credit of the drawer to pay his check in full, it is not obliged to make payment in part. Whether or not it would be justified in doing so, may be questioned. There is no authority on the point. Nor would banks often try to exercise such a right. If they can do so, they are obviously bound to indorse the amount of the payment on the check, which would, of course, still remain in the payee's hands, and which would otherwise on its face appear still to be good for the full value named in it, to the possible deception and loss of the drawer, or of innocent third parties. But the better rule perhaps would be, to save misunderstandings and complications, that, if a bank can not pay in full, it not only may not, but must not, pay at all. The drawer has not requested it to make a part payment. He has demanded that it do a certain act; to wit, pay a certain sum of money on his account. If it will not do this act according to the terms of the authority embodied in the request, it by no means follows that it is authorized to substitute for it a partial performance, or in fact a materially different act. Power

to pay only a part of a sum is not necessarily implied in an order, expressed without alternative, to pay that specific sum.

"A device whereby the checkholder may seek to obtain payment, where his check calls for a larger amount than the drawer's balance at the time of presentment, is that the holder may himself pay in, or cause to be paid in, the amount of the deficiency, and have the same placed to the drawer's credit. The drawer's account being thus made good, the check might perhaps be safely honored by the bank. But the bank is not justified in informing the holder what is the amount of the deficiency, or what the state of the drawer's account. He must find it out elsewhere if he can, since the bank can give such information only at its own peril." Morse on Banks and Banking, § 446.

Bolles, in his Modern Law of Banking, takes the same view as Morse does. He says:

"Not infrequently a depositor, through forgetfulness or otherwise, draws his check for a larger sum than he has on deposit. In such a case the bank may decline to pay whatever it may have. On the other hand, it may pay over the insufficient amount, crediting it on the holder's check. No reason is perceived, if the holder is willing to give up his check for whatever may be due to the depositor, why the bank should refuse to pay it. The reason usually given, that this is not a fulfillment of the drawer's order, is not satisfactory, for it is quite as reasonable to presume that the drawer supposed at the time of drawing his check that his deposit was sufficient. If so, is not the presumption fair that he would be pleased to have the bank pay, and the depositor receive, the sum in the bank?" Bolles on Modern Law of Banking, § 27.

Zane on Banks and Banking, p. 255, says: "A bank may refuse to pay a part of a check, but may agree to pay *pro tanto*," also citing the Bromley case.

It appears from these authorities that the bank is certainly under no obligation to apply toward the payment of a check a depositor's balance which is less than the amount of the check, and it is doubtful whether it has the right to do so, though these authors seem to think that it has the right but is not compelled so to do. It has been held by one of the English courts that a bank has no right to inform the holder of a check as to the state of a depositor's account. If the bank can not safely tell the holder of a check the amount of the depositor's balance, of course, the holder could not know what amount to deposit in order to make the check good. I think the safer rule is for the bank to decline to pay or to give the holder of the check any information about the account other than that there are not sufficient funds to meet it.

Where Depositor's Balance Is Insufficient to Pay All Checks Presented Simultaneously, None Should Be Paid.

A depositor draws a number of checks in favor of different individuals, which in the aggregate are more than the customer's balance. These checks are all presented at the same time to the bank on which they are drawn, through another bank. Should the drawee bank refuse to pay any of the checks or should it pay all of those which can be paid out of the money on deposit to the credit of the drawer?

The rule as generally announced under such circumstances is well stated by Mr. Morse, who is generally regarded as the leading authority on banks and banking.

“The payment of checks may be affected by the use of the clearing house in one important particular. Checks, as has been seen, must be paid in the order of presentment. But when the deputy of the bank takes from its drawer in the clearing house all the checks which it has to pay, he may receive a considerable number of checks of the same depositor. It is clear that there can be no priority among these. They are all received at precisely the same moment. For the order in which they are placed in the drawer has nothing to do with the presentment of them to or receipt of them by the bank, indeed is in nearly all cases unknown to the bank. The bank cannot look at their dates; for priority of presentment, not of date, secures priority of payment. So, if the bank cannot pay all the checks of any individual depositor then coming through clearing, it must pay none of them. It has no legal power or right to select or choose from among them certain ones which it will honor, or certain ones which it will dishonor. All or none must be paid. Any other course would render the bank liable to the holders of the dishonored paper. A check presented at the counter for payment must be paid at once, if there are funds enough to the drawer's credit to pay it alone; but if it is sent through clearing it must take its chance that his funds shall be sufficient to pay not only it, but all his other checks which shall be sent through clearing on the same day; and failing this, it must be dishonored.” 1 Morse on Banks and Banking, § 354.

There is, however, some authority for the proposition that the bank is authorized, if not required, under the circumstances, to pay all the checks which can be paid out of the depositor's balance. In the recent work of Michie on Banks and Banking, it is said:

“Where checks are presented by different individuals, at the same time, of an amount greater than the fund of the drawer in the bank, the officers of the bank are not bound to settle the conflicting claims of the holders of the different checks to priority of payment.

“Where a number of checks variously dated are presented to a bank simultaneously through the clearing house for payment, and

the aggregate amount of the checks is greater than the amount of the deposit, the bank is bound to pay the checks, but in any order that it may choose, until the deposit is exhausted, if there is no rule of the clearing house or custom of the banking community to the contrary." *Michie on Banks and Banking*, Vol. 2, p. 1139.

A similar statement is made in *Brady on Bank Checks*, p. 243. The only authority, however, for these statements appears to be the case of *Reinisch v. Consolidated National Bank*, decided by a Superior Court in Pennsylvania and reported in 45 Pa. Supr. Ct. 236.

Mr. Bolles, in his *Modern Law of Banking*, says:

"On the presentation of two or more checks simultaneously several practices among banks prevail; the more general is to send all the checks back, a step that is likely to be followed by a separate presentation with the chances of payment in favor of the nearest bank, unless the representative of some other can overcome the natural advantage by running faster or flying. Another practice, having legal sanction, is to pay the smaller checks, covered by the drawer's deposit." *Bolles' Modern Law of Banking*, Vol. 2, p. 612.

The authority cited in support of this statement that the bank may pay the smaller checks covered by the drawer's deposit is the case of *Sherburne v. Rickards*, decided by a Superior Court in Chicago and reported in 15 *Banking Law Journal*, p. 536.

It will be seen from the above that the law on the question appears not to be well settled. Mr. Morse cites no authority in support of his position, and the other authors seem to rely on Superior Court cases, which at best are very poor authority. The question has not been decided in Georgia.

The rule as laid down by Mr. Morse is, I believe, the better one.

Payment of Checks When Drawer Has Insufficient Funds to Cover First Check, but Sufficient Funds to Cover a Subsequent Smaller Check, the First Check Being Held by the Bank for Collection.

A depositor has \$20.00 to his credit in a bank, and draws a check for \$25.00, which the bank refuses to pay. The payee asked the bank to hold the check for collection. Subsequently another check signed by this depositor for \$10.00 is presented. Has the bank the right to refuse payment on the \$10.00 check on the ground that the \$20.00 to the credit of the depositor must be applied on the \$25.00 check?

Checks are payable in the order of their presentation. It seems to be the rule, also, that where several checks are presented at

once and the depositor has not enough money to his credit to pay them all, the bank may refuse to pay any of the checks. It would seem, however, that that principle cannot be made to apply in a case of this kind. The \$25.00 check was presented for payment, and payment was refused. When the \$10.00 check was subsequently presented, the bank then had an order to pay and a fund sufficient to comply with the order. Notwithstanding the fact that it still held the \$25.00 check for the purpose of collection, it was bound to pay the \$10.00 check. After the refusal to pay the \$25.00 check, the bank could not hold the balance to pay it thereafter, but was bound to honor other checks on the account to the extent of the depositor's balance.

The Mere Identification of a Stranger Will Not Make One Liable if Check Cashed for Him Proves Worthless.

A customer identifies a stranger, who cashed a check upon another bank. This check afterwards is returned with the notation "no account." The check having been cashed on the strength of the identification, is the party identifying the stranger liable for the amount of the check?

Under the case as stated, I do not see that there would be any liability. This assumes, of course, that the customer acted in good faith and simply identified the stranger as being the person whom he represented himself to be, and did not make any representation as to the check or the financial standing of the drawer of the check. One does not make himself liable by simply introducing a third party. Of course, if he acts in bad faith or introduces a party as some one other than he really is or makes any false statement as to the person whom he introduces, he might be liable in an action for deceit. If he was concerned in getting the money on the worthless check, he might be liable criminally for cheating and swindling, but the mere identification of a stranger would not make the party identifying liable.

Check Is Revoked by Death.

Should a bank refuse payment of a check issued by a person who died before presentation of the check for payment?

The rule, in the absence of statute, is thus stated in Michie on Banks and Banking, p. 1098:

"The death of the drawer operates as a revocation of a check, so that if the bank pays it after notice of that fact, it does so at

its peril. A bank paying a check with notice of the drawer's death is liable to his estate."

NOTE.—Section 184 of the Banking Act of 1919 provides: "The death or bankruptcy of a depositor unknown to the bank shall not revoke a check given by him, and a bank shall be authorized to pay through regular channels a check regularly drawn upon it by a depositor therein, notwithstanding the death or bankruptcy of such depositor unknown to the bank at the time of such payment."

Death of Payee After Negotiation Does Not Revoke a Check.

Is a bank authorized to pay a cashier's check where after indorsement the payee has died? In other words, does the death of the payee of the check after its indorsement cancel the indorsement or affect in any way the negotiability of the check?

The question has not been decided, I think, in Georgia, but the general rule is well stated by the Supreme Court of Michigan, in the case of *Brennan v. Merchant and Manufacturers Bank*, 62 Mich. 343, 28 N. W. 881, in which the court says:

"The death of a payee or indorser after a check has been negotiated cannot affect its negotiability further or prevent the drawee from safely paying it."

This case is frequently referred to in the textbooks, and seems to be recognized as authority. I am of the opinion that the bank would be authorized to pay the check on the indorsement of the payee although the payee may have died since he indorsed and negotiated it. Of course, if the check had not been negotiated, it could only be paid to the duly authorized representative of the payee, that is, to his executor or administrator.

Payment of Check by Drawee Bank Is Final as Against "Insufficient Funds."

A check drawn on the bank of A was cashed by the bank of B, which bank sent it to the bank of C for collection. The bank of C sent it to the bank of A, along with a number of other items. The check was stamped "paid," and remitted by the bank of A to the bank of C. On the same day the bank of A discovered that the account of the depositor was overdrawn, and thereupon notified the bank of C, returning the check and asking that bank to give it credit for the amount paid through error, which was done. The check was returned in due course to the bank of B. Is the bank of A liable for the amount of the check under the circumstances?

The general rule is that a bank is bound to know the state of the account of its customers, and that where it pays a check of one of its depositors it cannot claim that the payment was made

by mistake where the account is overdrawn or the depositor has insufficient funds to cover the check. The payment is in such cases due to the bank's own negligence in failing to ascertain the condition of the account, and, therefore, the bank cannot plead in defense that the check was paid by mistake. The rule is thus stated by Michie in his work on Banks and Banking:

"In the absence of a fraud on the part of the holder, the payment of a check by a bank is regarded as a finality, and the fact that the drawer has not funds on deposit will not give the bank any remedy against the holder."

"A mistake in regard to the amount of a customer's deposit is not such a mistake of fact as entitles a bank paying a check to recover back the amount from the payee. Such transaction is not a mistake of fact in a legal sense, only *laches*. Banks are supposed to be informed of a depositor's financial standing, and to know the condition of his account with them at the time of presentation of checks for payment. They are required, and for their own safety are compelled, to know at all times the balance to the credit of each individual customer, and they accept and pay checks at their own risk and peril. If from negligence or inattention to their own affairs banks improvidently pay when the account of a customer is not in a condition to warrant it, and if by mistake a check is paid when the drawer has no funds, the bank must look to the customer for rectification, not to the party to whom the check was paid. Michie on Banks and Banking, pp. 1145-1146.

And it has also been held:

"Where a check was offered and received by the drawee bank as a deposit, credited to the depositor's account, and charged to the account of the drawer, the transaction constituted complete payment of the check and could not be rescinded except for fraud or mutual mistake." American National Bank of Nashville, Tenn., *v. Miller*, 185 Fed. 339.

Under these authorities, the Bank of B can recover the amount either from the Bank of C or from the Bank of A. The Bank of A paid the check to an agent of the holder which was the same in effect as paying it to the holder. Under the law, this payment was final and irrevocable, and the bank cannot defend against its liability on the ground of mistake.

Nor does it make any difference that the Bank of A got the money back before it actually reached the Bank of B. The Bank of C was the agent of the Bank of B, and payment to an agent is payment to the principal. Furthermore, the Bank of C was an agent of the Bank of B to collect this check and remit the proceeds, and had no authority to do anything else. It was acting

outside of the scope of its authority in giving the Bank of A credit for the check, and the Bank of B would not be bound by that act.

**Bank Given Credit to Depositor for Checks Drawn on Itself
Can Not Charge Back for Insufficient Funds in Absence
of Contract or Well Known Custom.**

Can a bank receive on deposit checks on other banks and on itself, subject to be charged back and returned to the depositor in case they are not paid or in case there are not sufficient funds to cover the check when it happens to be upon the bank itself?

Where a bank receives checks on deposit drawn on itself by another depositor, the checks are treated as paid as soon as credit is given to the depositor.

The law on the subject is thus stated in Brady on The Law of Bank Checks, pp. 269 to 271 :

"In many instances it seems to be the practice of banks, when one depositor offers for deposit a check drawn on the same bank by another depositor, to credit the amount of the check in the depositing customer's pass book, and ascertain afterwards whether or not the check is drawn against sufficient funds. In cases of this kind it is held by the weight of authority that, where the deposit is made in good faith, and credit is duly given, the bank cannot afterwards revoke the credit, upon discovering the check to be an overdraft. These decisions take the view that there is no difference, in such a case, between requesting payment of the check in money and requesting payment by a transfer to the credit of the holder. In either event the bank has the option to receive or reject the check upon presentment, or to receive it upon such conditions as may be agreed upon. If it pays the check in cash to a *bona fide* holder, the transaction is closed so far as the holder is concerned; the bank cannot recover the money back from him. And the same is true if it credits his account with the amount of the check; there is a final payment which cannot be revoked. The holder, however, must act in good faith in order to be entitled to retain the benefit which the law accords him upon depositing a check to his credit in the drawee bank. Thus, it has been held that, where the holder of a check deposited it in the drawee bank, knowing that the drawer had no funds there to meet it, the crediting of the check to the holder did not constitute a payment of the check and the depositor could not recover the amount from the bank."

The bank, however, could make a contract with a depositor that checks were to be returned if it was subsequently ascertained that the drawers did not have sufficient funds on deposit to cover the

checks. And if it were the custom of the bank to return such checks and the depositor knew of such custom, he would be bound by it, and the bank would in that event be authorized to return such checks. As was said by the Court of Appeals of Missouri:

"No one will contend for a moment that it is not within the province of the depositor presenting the check and the bank on which the check is drawn to expressly agree that the payment shall be deferred for a reasonable time until the bank may ascertain whether or not there are sufficient funds of the drawer of the check in its hands to pay it. Such an agreement instead of operating an infringement of the established rule of law * * * amounts to no more than a reasonable modification of its application in the interests of justice. If it were competent for the parties to thus expressly agree with respect to the matter, it would seem to be competent, too, for them to tacitly do so under the established custom, well known to both, which obtained in good faith throughout an extended course of dealing." *Pollack v. National Bank of Commerce*, 151 S. W. 774.

An appropriate statement on deposit tickets and in pass books would probably be held to constitute a contract which would relieve the bank from liability.

Bank Is Not Required to Pay Check Stamped "Not Payable Through (named) Bank" When Presented by that Bank.

Can a bank refuse to pay checks stamped "not payable through a named bank" when presented through said bank?

The precise question has not been decided by our courts. The nearest case in point is that of *Farmers Bank of Nashville v. Johnson, King & Co.*, 134 Ga. 486. In that case it was decided, where checks drawn by Johnson, King & Co., of Macon, on the Farmers Bank of Nashville, had stamped on them "Payable through the Citizens Bank of Valdosta," that the Farmers Bank had the right to refuse to pay the checks when presented by another bank not coming through the Citizens Bank of Valdosta.

The court says that the drawer of a check has a right to direct the channel through which it shall be presented for payment, and that the payee of the check is bound to respect this direction. He can refuse to take the check at all on account of its direction, but if he takes it he must present it through the channels directed.

While the courts have held that it is competent to direct through what particular channel a check must be presented, they have

not decided whether it would be proper to forbid the holder of a check from presenting it through some named bank or other institution. In principle this would seem to be covered by the decision, and if a customer should stamp on his checks "Not payable through a named bank," a bank would be authorized to decline payment if the check should be presented through the bank named.

Recovery by Bank of Payment Made on Raised Check.

Where a bank cashed a raised check and charged it to the customer's account, what steps can be taken to recover the customer's money?

The person who raises or otherwise alters a check, or who knowingly passes an altered check, is guilty of a felony. If such person can be located, he could be prosecuted. The bank could also recover the amount in a suit against the person to whom the money was paid. The difficulty in such cases usually is that the person who would alter a check is not responsible financially.

As between the bank and the customer, there might be a very nice question as to who should lose the money. As to this, see next opinion.

Drawer of Raised Check Must Stand Loss Where His Negligence in Preparing Check Occasioned the Fraud.

If a drawer of a check writes it with pen and ink, and the check is successfully raised, is the drawer, and not the bank which pays the check, liable? How far is the drawer liable for failing to make his check proof against raising?

There is no rule of law which makes the drawer of a check written with pen and ink absolutely liable where it has been raised, simply because it was written with pen and ink. The rule is if the drawer of a check has been so negligent in drawing it as that it can be easily raised, he rather than the bank will be held liable. The rule is thus stated in Michie on Banks and Banking, pp. 1221 and 1222:

"Although, as has been seen, banks are held to a strict liability in the payment of forged checks, yet where the drawer of a check has been guilty of negligence facilitating the forgery or alteration or influencing the bank in the payment of such forged or altered paper, the bank is ordinarily relieved from its liability. A check may be so carelessly executed by the depositor as to

invite or give opportunity for forgery, and make him liable for a loss ensuing and excuse the bank. Thus, where the drawer of a check has prepared his check so negligently that it can be easily altered without suspicion, and alterations are afterwards made, the bank can not be held liable for paying the check so altered."

Another good statement of the rule is found in the case of *Critten v. Chemical National Bank*, 171 N. Y. 219, 57 L. R. A. 529, decided by the Court of Appeals of New York. In this opinion the court says:

"To relieve itself from liability to make good the amounts which it has paid on raised checks, a bank must affirmatively establish negligence on the part of the drawer which facilitated the commission of the fraud.

"The drawer of a check is not bound to prepare it so that no one else can successfully tamper with it, to charge the bank with the loss in case it pays it after its amount has been fraudulently raised.

"Whether or not the drawer of a check was negligent in signing it in the condition in which it was prepared is a question of fact to be determined largely by an inspection of the check itself."

In the case of *Espy v. First National Bank*, 18 Wall. 604, 21 L. Ed. 947, the Supreme Court of the United States says:

"Where money is paid on a raised check by mistake, neither party being in fault, the general rule is, that it may be recovered back as paid without consideration.

"But if either party has been guilty of negligence or carelessness, by which the other has been injured, the negligent party must bear the loss."

It will be seen from these quotations that it is a question of negligence whether the drawer is liable in case of the payment of a raised check. Generally, it would not be a question of law, but in each case it would be a question of fact for determination by the jury as to whether the drawer was negligent.

Note.—Under § 188 of the Banking Act of 1919, a depositor is required to notify the bank of the forgery or raising within sixty days after the voucher has been returned to him or within sixty days after notice has been given him to have his pass book balanced and call for his vouchers.

Drawer of check written in pencil and fraudulently altered, which is paid by bank in good faith, must stand the loss.

K. and M. draw a check on Bank of A., the check being written with an ordinary lead pencil. The check is delivered to J., an irresponsible negro, to be delivered to the payee. J. erases the name of the payee, fills in his own name, indorses the check, and cashes it at F. Bank. F. Bank, in due course, collects the amount from Bank of A. Can Bank of A. recover the

amount from F. Bank, and, if so, can F. Bank recover from K. and M. because of their drawing the check in such way as that it could be readily altered without detection and because of the delivery of such check to an irresponsible person?

The rule is well settled that "a bank which pays to any person the amount of a check fraudulently altered after signature may recover back from such person the amount so paid by it." Morse on Banks and Banking, § 479.

"A bank is not bound to know the signature of an indorser, and besides the holder of the check, whether he indorses it or not, warrants the genuineness of all prior indorsements. Therefore, if the bank pay a check upon which the name of a prior indorser is forged, it may recover back the amount from the party to whom it was paid or from any party who indorsed it subsequent to the forgery." Daniels on Negotiable Instruments, § 1663.

"Where a bank in good faith and without negligence pays, even to an innocent holder, a check drawn upon it which has been fraudulently and materially altered, it may recover from such holder the amount paid, under the general rule that money paid under a mistake of fact may be recovered back." Brady on Bank Checks, § 124.

Under these authorities, I am of the opinion that the Bank of A. may recover the amount paid on this check from the F. Bank.

The general rule is that a bank paying a forged or altered check can not recover the amount so paid from the drawer, but where the drawer by his own negligence or carelessness has in any way contributed to the fraud which has been perpetrated, the bank can recover, upon the theory that where one of two innocent persons must suffer by the wrong of a third person, he must stand the loss who put it in the power of the third person to commit the wrong.

"Although banks are held to a strict liability in the payment of forged checks, yet where the drawer of a check has been guilty of negligence, facilitating the forgery or alteration or influencing the bank in the payment of such forged or altered paper, the bank is ordinarily relieved from its liability. A check may be so carelessly executed by the depositor as to invite or give opportunity for forgery and make him liable for loss ensuing and excuse the bank. Thus, where the drawer of a check has prepared his check so negligently that it can be easily altered without suspicion, and alterations are afterwards made, the bank can not be held liable for paying the check so altered." Michie on Banks and Banking, page 1221.

"When the drawer has drawn his check in such a careless or incomplete manner that a material alteration may be readily accomplished without leaving a perceptible mark or giving the instrument a suspicious appearance, he, himself, prepares the way for fraud, and then if it is committed he, and not the bank, should suffer." Daniel on Negotiable Instruments, § 1659.

The question, whether the depositor or the bank paying forged or altered checks was negligent, is usually a question of fact to be determined from the circumstances of each particular case. A check or other negotiable instrument may be written or signed with a pencil, and an instrument so written is valid. But as a check written in pencil can be easily altered, and such alterations can not be readily detected even by a careful observer, it would seem under the authorities above quoted, that the drawer of the check would be liable to a bank which innocently and in good faith cashed the check, believing it to be genuine and unaltered. Of course, if there was anything suspicious about the appearance of the check or the circumstances under which it was cashed, the bank ought not to have cashed it, and if it did so, could not hold the drawer of the check. But if the alteration was in such way that the bank in exercising proper care did not detect it and cashed the check in due course of business, the drawer of the check, who put it in the power of the forger to alter the check, should stand the loss rather than the bank. It has been held, too, that where the drawer of a check turns it over to an irresponsible person who might be suspected of altering it, and such alteration is, in fact, made, that this, itself, is such negligence on the part of the drawer as to make him liable rather than the bank which innocently cashes the check.

Drawer of Check Is Liable to Holder Where Payment Is Refused for Insufficient Funds.

Is the drawer of a check liable where payment is refused by the drawee bank, for want of sufficient funds? Would the bank cashing the check be justified in garnishing the drawer's salary or his account with another bank?

A check is a bill of exchange drawn on a bank. The drawer of a bill of exchange is liable where the drawee refuses to accept or to pay, and the same rule holds with regard to the drawer of a check. I quote from Tiedeman on Commercial Paper, § 455:

"A check is no evidence of the liability of the drawer until it is shown that it has been presented for payment and dishonored. But when this is shown the drawer may be held liable on the check without direct proof of consideration. The law presumes that the check was given in satisfaction of some debt due by the drawer."

The law reads into a check substantially these words: There is in the hands of the bank on which this check is drawn the amount of money called for by the check belonging to me, which amount the bank will pay to you, or to any one you order the bank to pay it to, upon presentation of this paper. If the bank does not so pay to you or to any one to whom you indorse the check, I will pay the amount.

It will be understood, of course, that a check must be presented promptly to the bank on which it is drawn; otherwise, under some circumstances, the drawer is relieved of liability. If the check was presented promptly, and if the drawer refused to pay the same, the bank would be justified in bringing suit on the check and garnishing any funds which might be due to the drawer.

Section 226, Banking Act of 1919, making it a misdemeanor to draw a check on a bank where drawer has no funds, applies to national banks.

Does § 34, Article 20, of the Georgia Banking Law (§ 226), making it a misdemeanor to draw or utter a check upon a bank or other depository, knowing at the time that the drawer of such check had not sufficient funds for the payment thereof, apply to national banks?

The section was intended to apply to all banks, and the use of the words "or other depository" would clearly cover national banks even if the words "any bank" should be construed as applying only to banks organized and operating under the act. The section supersedes the Act of 1914 (Park's Penal Code, § 718-d) on the same subject.

Bank Cannot Pay or Certify a Post-dated Check in Advance of the Date it Bears.

Can a demand for payment be made on a post-dated certified check before the date which the check bears?

Payment on such a check cannot be demanded prior to the date on the face of the check. A bank cannot even certify a post-

dated check, and a post-dated certified check stands on exactly the same footing as any other post-dated check. I quote from the decision of the Court of Appeals in *Smith v. Maddox-Rucker Banking Company*, 8 Ga. App. 289:

"A post-dated check (i. e., a check dated at a time in future) is not subject to payment or acceptance until the time of its date arrives. If it be presented at a time in advance of its date, the drawee, even if he has funds on hand sufficient to pay it, cannot pay it, or retain the funds to pay, as against other checks or drafts presented and payable prior to its date. The drawer of a post-dated check does not undertake to have the funds in the drawee's hands to meet it before the time it bears date arrives."

Right of Bank to Recover Money Paid on Post-dated Check.

If a bank should pay a post-dated check by inadvertence, could it recover the amount paid from the party for whom it was cashed?

I have been unable to find any decision on the question. The rule as stated by the text writers is that the payment of a post-dated check before the date which it bears is entirely at the risk of the bank. It is, of course, well settled that the check cannot be charged to the account of the drawer, and that no recourse can be had on him for the amount.

Morse says that the bank's "only source of restitution is from the depositor." Morse on Banks and Banking, 5th Ed., Vol. I, p. 699.

"If a bank pays a post-dated check before the day of its maturity, it does so entirely at its own risk." Magee on Banks and Banking, 2d Ed., p. 328.

It is true that money paid by mistake may ordinarily be recovered from the payee. Quoting again from Morse:

"When a bank honors a draft by mistake of fact, the money may be recovered." Morse on Banks and Banking, Vol. 2, p. 55.

But while this is true, where the bank is negligent in making the payment, it can not ordinarily claim that the payment was by mistake. Quoting from Michie on Banks and Banking, p. 1145, in regard to a mistake as to the amount of customer's deposit:

"A mistake in regard to the amount of a customer's deposit is not such a mistake of fact as entitles a bank paying a check to recover back the amount from the payee. Such transaction is not a mistake of fact in a legal sense, only *laches*. Banks are supposed to be informed of a depositor's financial standing, and to know the condition of his account with them at the time of presentation of checks for payment. They are required, and for their own safety are compelled, to know at all times the balance

to the credit of each individual customer, and they accept and pay checks at their own risk and peril. If from negligence or inattention to their own affairs banks improvidently pay when the account of a customer is not in a condition to warrant it, and if by mistake a check is paid when the drawer has no funds, the bank must look to the customer for rectification, not to the party to whom the check was paid."

The cashing of a post-dated check is so clearly negligent on the part of the bank that it would seem that the bank could hardly claim that the payment was made under a mistake of fact or through any misapprehension. The only theory upon which the bank would be allowed to recover from the person to whom the money was paid is that the payee fraudulently induced the bank to pay, the rule being well established that where the payee is a party to the fraud by which money is obtained improperly on a check the amount can be recovered from him. If not actually guilty of fraud when by presenting a check which he knows is not due he induced the bank to cash it, he should not be permitted to take advantage of his own wrong and say that the bank was negligent and should not have cashed the check. Even if he was entirely innocent in presenting the check, he is in as good if not better position than the bank to know that the check is not collectible at the time presented, and where by his conduct he induces the bank to pay there would seem to be good reason for holding that he should reimburse the bank for the amount so paid.

This view is supported by Morse in his discussion of payment by mistake. He says:

"Money paid with full information as to the facts, but in mistake of law, cannot be recovered. But money paid under mistake of fact, the error not being negligent, or if negligent not causing loss to the payee, or if both negligent and causing loss, yet the payee was negligent equally with or to a greater degree than the payer, can be recovered." Morse on Banks and Banking, 5th Ed., Vol. I, p. 56.

There is no way to tell, of course, what view the courts might take of the question. It might be held, and with considerable reason, that the payment having been made carelessly and negligently by the bank, when the check itself showed on its face that it was not entitled to payment, could not be recovered. On the otherhand, it might be held that the payee having induced the bank to pay could not take advantage of such payment and hold the money at the expense of the bank. There would seem to be very good reason for holding that the bank should have the right to recover the money.

**Over Payment by Drawee Bank Through Mistake of Fact
Can Be Recovered.**

Where a check drawn for \$125.00 in the body, but with marginal figures \$175.00, is cashed at the latter figure, and after passing through two or three other banks is finally paid by the bank on which it is drawn at \$175.00, which bank is compelled to make good to its customer the amount paid in excess of the face of the check, what recourse, if any, has the bank?

First. There is no doubt that the written amount in the face of the check controls over the figures.

Second. Money paid by mistake of fact can generally be recovered from the payee. A bank paying a check by mistake can ordinarily recover, its right to recover being entirely independent of the liability of an indorser, and being based on the principle that where one pays money by mistake for the benefit of another, it may be recovered unless the payment is so negligently made as to be the fault of the payer, or unless the person to whom payment is made is an innocent holder for value. Under such circumstances the equity of the holder would be superior to that of the bank.

Applying this principle to the case stated, I should say that probably the bank on which the check was drawn could recover the excess payment from the bank to which it was paid. This bank could in turn recover the amount from the bank to which it paid the excess amount and this bank could recover from the original payee.

Note.—As to payment by mistake, see preceding opinion.

**Undated Checks Are Valid and Bank May Pay on
Presentation.**

Should a bank cash a check which is not dated?

I do not think the question has been passed on by the Supreme Court or the Court of Appeals of Georgia, and I have only been able to find two or three decided cases from other States. The text writers seem to disagree on the subject. Morse on Banks and Banking, says:

"A check must be dated. It may be dated either on, before, or after the day it is issued. But it would seem that if a check is not dated at all, and contains no statement of a date when it is to be paid, it is never payable. For a check is payable either on the day of its date, or else on some other day specifically designated in

it. So, if it is not dated at all, and if no designation occurs, expressed in the body, which might perhaps operate to supply the deficiency of a formal dating it is reasonable to say that it can never become due, and payment can never be demanded. If this rule, which is not directly asserted in any adjudication, goes at all too far, it is nevertheless utterly impossible to doubt that a bank would be fully justified in refusing to pay a check showing an unexplained deficiency of so important a character. It has been said that a check may be dated on Sunday, though it cannot be payable on that day." Morse on Banks and Banking, § 368.

This view is concurred in by Magee on Banks and Banking, from which I also quote:

"If a check has no date, it has no definite time for payment. A check is only payable on the day of its date or on a day a future date, or at the time of presentment subsequent to its date. The bank, therefore, if a check is not dated has no direction when to pay or charge the drawer's account; but a bank may pay a check without risk and without a date when presented by and payable to the drawer himself. * * * But the bank cannot charge the depositor's account with a sum of money, which sum is to be paid to or transferred to the account of another, without direction or authority in writing; and this authority must be dated and signed by the party to be charged.

"The date is important, as stated, because it fixes accurately the time in which payment may be demanded. It is not due until a date is fixed. If it fails to bear a date, the bank is at once put upon inquiry and may refuse payment upon the special ground that the check not being dated, no time of payment is fixed. * * * The fact that a check is not dated or that the date is changed as stated, would put the bank on inquiry, and it has been held that an undated check is never payable." Magee on Banks and Banking, § 182.

Neither of these authors cite any authority for their statements.

The recent work of Michie on Banks and Banking, which is by far the most exhaustive treatment of the subject, does not discuss the question at all.

Bolles, in his Modern Law of Banking, says:

"A check should be dated. If it is not and contains a blank to be thus filled, the holder may insert the date of its delivery." Bolles, Modern Law of Banking, p. 589.

This would seem to imply that the date is not essential. Weitzel on the Law of Deposits, § 67, uses almost the same language as that quoted from Bolles.

On the other hand, Tiedeman on Commercial Paper, says:

"The form and formalities of the check differ but little from that of the ordinary bill of exchange. Like all other kinds of

commercial paper, the check usually contains a date, although this is not necessary to the validity of the instrument. It may contain the true date; or the check may be ante-dated or post-dated." Tiedeman on Commercial Paper, § 435.

This is in line with the rule so far as other commercial paper is concerned, it being almost universally held that the date is not essential to the validity or negotiability of commercial paper, and I am inclined to think that this is the better doctrine. A check is generally regarded as an inland bill of exchange drawn on a bank or banker, payable on demand, the time of presentment fixing its maturity. The date seems entirely immaterial, for checks are paid, not according to date, but according to the time of presentment for payment. Of course, no one could say in light of the authorities what a court might hold. In my opinion, however, if the question were raised in Georgia, the court would hold that the date is immaterial, and that the bank is authorized to pay an undated check.

The only decided cases which I have been able to find are: *Gordon v. Lansing State Savings Bank*, 133 Mich. 143, 94 N. W. 741, in which it was held that a date is not essential to the validity of a check; and *Weld v. Eliot Five Cent Savings Bank*, 158 Mass. 339, 33 N. E. 519, holding that an undated order on a savings bank for the payment of a deposit is valid. There have been a number of cases in which it has been held that the date of a bill of exchange is not essential.

Drawer of Check Has the Right to Stop Payment.

Where a depositor gives notice to a bank to stop payment of a check, is the bank authorized to decline to pay the check?

I quote from two of the leading authorities on banks and banking:

"A check is simply a written order of a depositor to his bank to make a certain payment. It is executory, and as such it is of course revocable at any time before the bank has paid or committed itself to pay it. But after the bank has paid, or has placed itself under an obligation, or has incurred a liability to comply with the order, the drawer's power to revoke is at an end. * * * The bank is the drawer's agent. Its primary duty is to hold or to pay his money as he directs. Primarily it owes no duty to the holder, except under and by virtue of directions from the drawer." Morse on Banks and Banking, 5th Ed., § 398.

"An ordinary, uncertified check on a general account is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually paid, or accepted by the bank on which it is drawn. After acceptance or payment, however, by the bank, the drawer's right of revocation is lost." *Michie on Banks and Banking*, p. 1101.

The text is supported by any number of decisions from the courts throughout the country.

Of course, "the drawer exercises his right to countermand payment of a check at his own risk. By this exercise he cannot affect the validity of a check, unless procured from him by fraud or mistake, and he cannot affect it at all in the hands of an innocent holder for value." *Parker-Fain Grocery Company v. Orr*, 1 Ga. App. 628-631.

Bank Paying Check After Payment Stopped Does So at Its Own Risk.

A customer draws a check on a bank. He later stops payment on the check. After some years the check is presented and is paid, the bank overlooking the order stopping payment. What are the bank's rights in the premises?

A check is the order of the depositor to pay out of the amount due him by the bank a given sum to the payee. This order he has the right to countermand at any time before the actual payment of the check, or before the bank becomes liable by certification to pay it. If the bank pays after the order is countermanded, that is, after payment of the check is stopped, it does so at its peril, and the drawer of the check can recover the amount from the bank.

So far as the person to whom the check is paid is concerned, payment to him is a purely voluntary payment on the part of the bank. The bank is in the same position as where it pays a forged check; it cannot in either case recover the amount from the person to whom it paid it, unless that person was guilty of some fraud.

The only theory upon which the bank could recover would be that the payment was by mistake. The courts generally hold that this is not such a mistake as would authorize the recovery of the amount. The precise question has been decided by the Supreme Court of New Jersey in the case of *The National Bank of N. J. v. Berrall*, 66 L. R. A. 599, from which I quote:

"Where a bank receives in the ordinary course of business a check drawn upon it, presented by a *bona fide* holder, who is without notice of the fact that payment thereof has been stopped, and the bank pays the amount of the check to such holder, it cannot afterwards recover back the money as paid by mistake on the ground that payment of the check had been countermanded by the drawer."

Unless the party presenting the check knew that it had been countermanded, or in some way misled the bank in regard to it, it would not be entitled to recover the amount paid from him, and, as already stated, it is, of course, liable to make good the amount to the customer to whose account it charged the check.

Payee of Check Has No Right to Stop Payment of a Check.

If A draws a check in favor of B, and B endorses it payable to the order C, can B then stop payment of the check to C?

The payee of a check has no contractual relation with the bank, and, therefore, has no right to direct the bank either to pay or not to pay. The bank is not paying his order or out of his funds, but is paying out of the funds of the drawer and upon his order. Therefore, the payee of the check, particularly after he has indorsed it and, therefore, put it beyond his own control, has no right to give the bank any direction with regard to it, and the bank is not authorized to obey his order to stop payment on the check. Of course, where a check has been stolen or fraudulently obtained from the payee, the payee may notify the bank that the holder is not entitled to payment, and the bank, if this information is correct, would be justified in refusing payment to the holder. But this is not upon the theory of stopping payment, but is simply notice that the holder of the check has no title to it, and, therefore, is not entitled to collect it.

Holder Has Right of Action Against Both Drawer and Indorser When Payment Is Stopped.

A draws a check in favor of B on an out-of-town bank, which B indorses and cashes at the local bank with which he does business. A stops payment on the check. Has the paying bank any recourse on the maker and indorser of the check?

The drawer of a check has the right to stop payment on it either with or without reason for so doing, and the bank on which

the check is drawn must respect the request of the drawer to stop payment. But a check is a negotiable instrument, and a *bona fide* holder for value, where payment has been stopped, may have recourse on both the drawer and indorsers of the check.

In the case stated it is assumed that the bank cashed the check, without any notice that payment had been stopped or that there was any other defect connected with it. If this is the case, that bank has the right to bring suit against the drawer and indorser of the check to collect the amount paid out on it.

When Check Is Accepted for Deposit After Banking Hours on Condition That Payment Is Not Stopped Before the Following Day, Bank May Charge Check to Depositor if Payment Is Stopped.

After business hours on Saturday a check was deposited, the teller advising the depositor that the drawer of the check would have until the opening of the bank for business on Monday within which to stop payment. Before the bank opened on Monday the drawer of the check notified the bank to stop payment. Is the bank liable to the depositor for the amount of the check?

The check having been offered to the bank for deposit after business hours, the bank was under no obligation to accept the deposit. It did not accept it unconditionally, but advised the depositor that it would accept the deposit subject to the right of the drawer to stop payment on the check. The bank could have refused to accept the deposit altogether. If it accepted it on condition, the depositor has no right to insist that it was an unconditional acceptance. It was practically agreed that the deposit would be taken, but entered during business hours on the next regular business day. In the meantime the deposit was held subject to the right of the drawer of the check to stop payment, and the depositor took this risk. I do not think the depositor has any right to complain that payment was stopped on the check, and, therefore, the amount charged back to his account.

Bank Has No Right to Stop Payment of Its Cashier's Check.

Can a bank refuse payment of its cashier's check which was indorsed by the drawee and cashed by another bank in good faith, the payee claiming that the check was taken from him by force after it was indorsed and requesting the drawee bank to stop payment on the check?

The rule applicable to cashiers' checks is stated in Michie on Banks and Banking, p. 1105, as follows:

"A cashier's check, being merely a bill of exchange drawn by a bank on itself, and accepted in advance by the act of its issuance, is not subject to countermand by the payee after indorsement, as is an ordinary check by the drawer, and the relations of the parties to such an instrument are analogous to those of the parties to a negotiable note payable on demand."

This states the law on the subject. The drawee bank would not be authorized to refuse payment of the check if the bank which cashed it and is presenting it for payment is the *bona fide* holder of it. That bank has all the rights of a *bona fide* holder if it took the check without notice that it was taken by force from the payee after it was indorsed, and the fact that it was so taken would not affect its right to have the check paid upon presentation.

Indorser on Whose Credit Money Is Loaned Which Is Deposited to Credit of the Maker, Has No Right to Stop Payment of Checks Against the Deposit.

A borrows money from a bank on B's indorsement, which is required by the bank. The money is deposited in the bank to A's credit, in a general deposit. B subsequently notifies the bank not to honor A's checks on this fund. If the bank follows B's instructions and refuses to pay a check drawn by A, is it liable to A?

The bank would not be justified in refusing payment of the check under the circumstances stated. The deposit apparently was made to the individual credit of A without any conditions or restrictions whatsoever. While it is true that he borrowed money on the strength of the indorsement of another person, yet with the consent of that person the money was deposited to his own credit, and he was entitled to control it. The fact that the money was obtained on another's indorsement would not give that other the right to control the deposit.

The bank would be liable in damages for dishonoring the check. If it had refused to comply with the request of the indorser, this would not have increased his liability in any way or released him as indorser. He had no control over the money whatever, and, therefore, had no right to stop payment of the check.

Bank Is Liable to Make Good a Check Which It Pays Upon a Forged Indorsement.

Where a bank pays a check upon a forged indorsement of the payee's signature and charges the check to the depositor's account, is it liable to the depositor to make good the amount upon the discovery of the forgery?

The case of the Atlanta National Bank *v.* Burke, 81 Ga. 597, seems to be one of the leading cases upon the subject and is very frequently cited by the courts and text writers.

"That Burke was himself imposed upon by the forgery by Knapp of the name of Knapp's wife as maker and grantor of a note and deed, would not preclude Burke from complaining of the payment by a bank of a check drawn upon it by Burke in favor of Mrs. Knapp to Knapp, upon the forged indorsement by Knapp of her name upon said check. Nor is it true that, because Knapp's own indorsement was genuine and followed the forged indorsement of his wife's name and he was the last indorser, the bank was not bound to look to the genuineness of her indorsement.

"When the bank reported to Burke, in a statement of its account with him and return of his bank book with the check in question, that it had paid the money on the check, it appearing therefrom that the money was so paid on the indorsement of Mrs. Knapp though actually paid to Knapp, he being the last indorser, Burke had a right to rely upon the supposition that Mrs. Knapp's indorsement was genuine, there being nothing to put him upon notice that it was forged."

The doctrine of the case appears to be well established. Under this case, I hardly see how the bank can escape liability. The drawer of the check directed the bank to pay to a named person or to that person's order. It did not comply with this direction when it paid to anyone else.

The rule that a bank is liable to the drawer of a check, where it pays upon a forged indorsement, is thoroughly established. It is very clearly stated in Morse on Banks and Banking, § 474, where a number of cases are quoted and others cited:

"Where a check is drawn payable to the order of any actually existing person or corporation, if the order or indorsement of such payee is forged, payment by the bank is no acquittance.

"The depositor has directed payment to be made in a certain manner; a payment made otherwise than according to his directions is no discharge of the bank's obligations towards him. Neither has the holder, under a forged indorsement, any title to the paper, or any right to receive payment upon it."

There is also an elaborate discussion of the question in the work of Michie on Banks and Banking on pages 1093, 1097, 1203, 1209-13, apparently citing all of the decided cases.

The Supreme Court of the United States in *Leather Manufacturers National Bank v. Merchants National Bank*, 128 U. S. 26, 32 L. Ed. 342, states the rule thus:

"A bank cannot discharge its liability to account with the depositor to the extent of the deposit except by payment to him or to the holder of a written order from him, usually in the form of a check. If the bank pays out money to the holder of a check upon which the name of a depositor or of a payee or indorsee is forged, it is simply no payment as between the bank and the depositor, and the legal state of the account between them and the legal liability of the bank to him remain just as if the pretended payment had not been made."

There are a great many other authorities to the same effect which are cited in Michie.

Bank Generally Held to Be Liable for Paying Check to Person of Same Name as the Payee.

Is a bank liable for paying a check to a person of the same name as the payee where it has no means of knowing that payment is being made to the wrong person?

It has been held, generally, that the bank making the payment is liable. See note to *Weisberger Co. v. Barberton Sav. Bank (Ohio)*, 34 L. R. A. (N. S.) 1100.

This seems to be the weight of authority, but it is too harsh a rule. It is not supported by reason, and the cases so holding have been severely criticized. The drawer of the check directs payment to a named individual. The check gives no other description than the name. The bank making the payment ordinarily must satisfy itself that the person demanding payment is the person named in the check as payee, but it can not do more than ascertain that the person presenting the check is the person whom he purports to be, and when it has done this it has fully met all the requirements. It is utterly impossible for the bank to know which of two John Smiths is intended, when there is no other description than the name given in the check. Under these circumstances, I think the bank should be protected in paying the check, and the drawer should lose the amount of it. Of course, if there is anything to put the bank on notice that the wrong person presented the check, it should not be protected in such payment.

Nondrawee Bank Liable Where It Cashes Check on Indorsement of Person of Same Name as Payee.

Where a person having the same name as the payee of a check indorses the check and it is cashed by a non-drawee bank, which has no reason to suspect that such person is not the payee, is the bank liable for the amount paid on the check?

It is well settled, where a person having the same name as the intended payee of a check, but who is not the same person, indorses the check, that such indorsement is a forgery, although the person signing signs his own name and makes no attempt to copy the signature of the real payee. No title passes on a forged indorsement, and where a bank pays a check upon a forged instrument, it cannot charge its depositor with the amount so paid, although it may have acted in perfect good faith.

The rule is also well settled that where a nondrawee bank pays a check upon a forged indorsement the bank on which the check is drawn, having paid the check on the strength of the prior indorsement of the first bank, can recover the amount so paid, the reason being that a bank is under no obligation to pay a check drawn on another bank, and when it does so it pays at its peril. Before paying a check on request to a stranger, a bank is supposed to require identification and proof sufficient to enable it to know that it is paying to the right party, and the bank on which the check is drawn may assume that the paying bank has made such an investigation before the check was actually paid.

If in the case stated, the bank on which the check is drawn can show that the check has been paid to the wrong person, although paid to a person of the same name, it could be compelled to reimburse the amount paid. The bank could recover of the person for whom it cashed the check the amount which was paid to him, and this seems to be the only way in which the bank could reimburse itself. If the nondrawee bank indorsed the check, it would be liable as indorser, for an indorser guarantees the genuineness of all previous signatures.

Nondrawee Bank Not Liable for Cashing Check Presented by Named Payee When Drawer Intended a Different Payee.

A bank issues a cashier's check, making it payable to a named person, though intending to make it payable to another. The check is forwarded by mail and is received by a person bearing the name which is written in

the check as the name of the payee. This person indorses the check and has it cashed by another bank. Can the first bank hold the paying bank liable?

Where the bank issuing the cashier's check makes it payable to a named person, intending to make it payable to another, the paying bank could not by any kind of inquiry ascertain what was in the mind of the cashier when he drew the check. How it would be possible to make the paying bank responsible for the mistake of the cashier drawing the check is more than I can understand. Of course, if there was anything suspicious about the circumstances surrounding the cashing of the check, the paying bank might be justified in refusing to cash it, but I do not understand that there was anything of that nature in this transaction. It appears that the check was drawn payable to a named party, that a party by that name and known to the paying bank to be a person of that name presented the check for payment, and that it was cashed by this bank.

It seems to me that the only recourse of the bank that issued the check is on the party who got the check, and who, knowing that it must have been intended for another, cashed it himself. Clearly the bank paying the check is not responsible, unless it could be shown that it in some way participated in the fraud of the party cashing the check.

**Drawer Not Liable on Check Bearing His Signature Only,
Which Is Stolen and Blanks Filled in.**

A check bearing only the name of the drawer is stolen from the drawer's check book. If the check is filled out and negotiated, is the drawer liable to an innocent holder? Would not the principle that one is liable where he puts it in the power of another to do harm, make the drawer liable?

This question has been variously decided by different courts. The weight of authority seems to be that a negotiable paper, note, bill of exchange, or check, which is stolen before delivery has no validity and is void even in the hands of a *bona fide* holder. The Supreme Court of Georgia in the case of *Reese v. Fidelity Assurance Society*, 111 Ga. 482, held that "delivery is essential to the validity of a promissory note." In support of this decision, the court cites Tiedeman on Commercial Paper, § 34, from which is taken the following quotation:

- "Until the bill or note has been delivered to the payee, it can have no validity. Intentional delivery is also essential. For,

while the possession of a commercial paper by the payee or some one else, other than the maker or acceptor, to whom on its face it appears to be payable, is *prima facie* evidence of a good title, yet it is not conclusive; and if it be shown that there has been no delivery to the payee, it is valueless even in the hands of an innocent purchaser. As long as a bill or note has not been delivered, it is a nullity."

The Supreme Court also cites 1 Daniel on Negotiable Instruments, § 63, which is to the same effect. This writer says also, on page 1016, that where an incomplete instrument has been signed and stolen without any delivery, and the blank has been filled, it is sheer forgery, in which the maker is not involved, and on which paper he is not bound.

Nor would the well-known principle that a person is liable where he puts it into the power of another to do harm, render the drawer liable. It is on this principle that, where a person delivers a note or check signed in blank to an agent or other person to fill in the blank, he is bound for the amount of the note or check as filled in, although it may be for a much larger amount than was authorized. As was stated by the Supreme Court of the United States in *Bank of Pittsburgh v. Neal*, 22 How. 107, 16 L. Ed. 328.

"Where a party to a negotiable instrument intrusts it to the custody of another, with blanks not filled up, whether it be for the purpose to accommodate the person to whom it was intrusted, or to be used for his own benefit, such negotiable instrument carries on its face an implied authority to fill up the blanks and perfect the instrument; and as between such party and innocent third parties, the person to whom it was so intrusted must be deemed the agent of the party who committed such instrument to his custody—or, in other words, it is the act of the principal, and he is bound by it."

But where the instrument is not delivered at all, but is stolen from the maker in an incomplete state, there is no authority to the thief to fill in the blanks, and it can hardly be said that the negligence of the maker in leaving the paper where the thief could get hold of it was the proximate cause of the injury to the innocent holder. The leading case on the subject is *Baxendale v. Bennett*, L. R. 3 Q. B. D. 525, decided by the English Court of Appeals, where an acceptance on an unsigned draft was stolen from the drawer of the acceptor. In this case it was held that the negligence of the defendant in accepting the draft and leaving it in his desk would not justify a recovery. I quote from the opinion:

"Suppose he had signed a blank check with no payee or date or amount, and it was stolen, would he be liable or accountable, not merely to his banker, the drawee, but to a holder? * * * I can not think so. * * * The defendant has not voluntarily put into anyone's hands the means, or part of the means, for committing the crime. But it is said that he has done so through negligence * * * But then this negligence is not the proximate or effective cause of the fraud. A crime was necessary for its completion."

This case is cited by all of the textbooks on negotiable instruments, and most of the decided cases. The Supreme Court of the United States in the case of *District of Columbia v. Cornell*, 130 U. S. 655, 32 L. Ed. 1041, cites it with approval, the court holding that "when the maker of a negotiable instrument lawfully cancels it before maturity, his liability upon it is extinguished, and cannot be revived without his consent." In that case the cancelled instrument had been stolen and the cancellation erased, and the paper sold to a *bona fide* holder.

The case of *Knoxville National Bank v. Clark*, 51 Ia. 264, 33 Am. Rep. 129, states the reasons usually given for holding the drawer of a check or maker of a note liable under such circumstances, and answers them as follows:

1. That the drawer is estopped from showing the truth. This has been exploded in both England and in this country. The drawer has not done or omitted to do anything upon which an estoppel can be based.
2. That the drawer of the check was negligent in leaving it in an incomplete condition. But it could not be anticipated that such negligence would cause another to commit a crime. And can it be said that a person is negligent who does not anticipate and provide against the thousand ways through or by which crime is committed? Is it not requiring of the ordinary business man more diligence than can be maintained on principle, or is practicable, if he is required so to protect and guard his business transactions that he can not be held liable for the criminal acts of another? If the drawer is liable on the theory of negligence, why should not the negligence of the owner of goods which are stolen excuse the *bona fide* purchaser?
3. That when one of two innocent persons must suffer by the wrongful act of another, he must suffer who placed it in the power of such third person to do the wrong. It seems that such rule can have no application to this class of cases. It has never

been carried to the extent of making one person civilly liable for the crime of another, and, on principle, we think it can not be.

4. That the free interchange of negotiable paper requires the establishment of this rule. But at the present day negotiable paper is not ordinarily freely received from unknown persons. The necessities of trade and commerce do not require the law to be so construed as to compel a person to perform a contract he never made, and which it is proposed to fasten on him because some one has committed a forgery or other crime.

It is probable, as was stated in the case of *Salley v. Terrill*, 95 Me. 553, 55 L. R. A. 730, "that there may be such gross carelessness or recklessness of the maker in allowing an undelivered note to get into circulation as will justly estop him from setting up nondelivery, as if he were knowingly to throw it into the street, or otherwise leave it accessible to the public, with no person present to guard against its abstraction under circumstances where he might reasonably apprehend that it would be taken." But I do not think the signing of a check and leaving it in the drawer's check book in his desk or at his place of business would be considered such gross carelessness or recklessness as to make him liable where it was stolen, the blanks filled in and the check negotiated.

As stated in the beginning, some of the courts hold the maker liable under these circumstances, but the weight of authority seems to be against this view. And I think that in Georgia, where our Supreme Court holds delivery essential to the validity of a commercial instrument, it would take a very unusual case of negligent conduct of the part of the drawer of an incomplete check to make him liable where it was stolen and negotiated without his authority.

Check Payable to "Cash or Order" Is Payable to Bearer and Is Valid.

Is a check payable to "cash or order" payable to bearer?

To be valid a check must have a payee, "but a check made payable to an indefinite or obscure thing, for example, 'to the order of 1658' or 'bills payable,' is held to be payable to bearer. The same rule applies to a check payable to a fictitious payee." Bolles' Modern Law of Banking, p. 595. I quote also from Magee on Banks and Banking, p. 310: "It is held that where a check is

drawn payable to a fictitious person or to a name or figure, as for example '1913' or a word 'rent,' it is in law regarded as payable to bearer and is transferrable on delivery." Of course, a check payable to "cash" is as definite as one payable to "bills payable" or to "rent," and would be regarded as payable to bearer.

COLLATERAL.

Holder of Collateral Is a Purchaser for Value.

Does the holder of a promissory note as collateral for a debt stand in the same position as a purchaser?

It is expressly provided by the Code that:

"The holder of a note as collateral security for a debt stands upon the same footing as the purchaser." Park's Ann. Code, § 4289.

When Husband Pledges Wife's Bonds, the Pledgee Without Notice Is Protected.

A gentleman borrows money from the bank on city bonds which he brings in and delivers. Years afterwards his wife claims the bonds as being her personal property. Where does the bank stand?

I quote from an excellent opinion by the Court of Appeals the rule which governs in such cases:

"The purchaser for value of a commercial paper who takes it from the apparent owner acquires a good title as against an undisclosed true owner, in the absence of *mala fides*. Mere want of such caution in the purchaser as ordinarily prudent men usually exercise in other transactions is not sufficient to defeat his title.

"Ordinarily, where commercial paper is offered in the usual course of business, the purchaser need not make inquiry as to the ownership, when the transaction appears regular on its face.

"If the purchaser knows or has reasonable cause to believe that the apparent owner is not the true owner, and enters into privity or participation in the fraud upon the true title, his title is defeasible." *Third National Bank v. Poe*, 5 Ga. App., pp. 113. 114.

In the case cited a husband, who was indebted to a bank, brought to the bank a cashier's check of another bank payable to his order, indorsed it, deposited it to his credit and gave his personal check in settlement of his note due the bank. It was held that the bank in the absence of bad faith on its part was

not liable in an action brought by the wife to recover the value of the cashier's check, although it was obtained with her money and although the bank which accepted it had cause to suspect that the wife was in some way instrumental in procuring it for the husband.

Judge Bleckley once said, in a case in which a wife brought suit to recover money which had been paid by her husband to his creditors, that

"It is only where *notice* is brought home that a wife's rights will be saved. The burden of proof is upon her, for in every case where money is received and value given, there is a presumption that title passes, which stands until it is rebutted by evidence. And the measure of evidence should not be too scant in mere deference to sex. When man and wife coöperate for good they can do much good; and so, when they combine against third persons and coöperate for evil, they can do much harm. In protecting women, courts and juries should be careful to protect men, too, for men are not only useful in general society, but to women especially." *Humphrey v. Copeland*, 54 Ga. 543.

Pledgee Liable for Value of Collateral Lost Through His Negligence.

A customer borrows money from a bank, pledging as collateral a note retaining title to a mule. This collateral note is lost by the bank. Is the bank liable to its customer for the amount of this note?

Under our Code, § 3535, the pledgee of promissory notes or other evidences of debt must exercise ordinary care in collecting and securing the same. Where loss results to the pledgor on account of the failure of the pledgee to exercise such ordinary care and diligence, the pledgee is liable for such loss. So if the note was lost through the careless handling or negligence of the bank, the bank would be liable to its customer for whatever loss he might sustain by reason of its negligence. The mere loss of a paper, however, does not necessarily result in any damage. Suit may still be entered on the paper in spite of its loss, and it may be collected just as though the original paper could be produced. If it became necessary, the lost paper could be established through appropriate proceedings, and the established copy would take the place in all respects of the lost original.

If a note should be payable to bearer or indorsed in blank, and should get into the hands of a *bona fide* holder, so that neither the bank nor the original pledgor could collect it, the bank, of

course, would be liable, but ordinarily there is little danger of such a contingency, and the mere loss of the paper would not deprive the pledgor of any substantial right, though it might put him to some little inconvenience. Any inconvenience or expense resulting from the loss should, of course, be compensated for by the bank. The bank would be liable only for the value of the paper, not necessarily for the amount named in the face of the paper. In the case mentioned, if the maker of the paper was insolvent and the mule was dead, no loss would result to the pledgor, although the paper itself could not be found. The burden would be upon the customer to show the value of the lost collateral, and the bank would not be liable for more than the amount of this loss.

**The Renewal of a Note to Secure Which Another Note Is
Pledged Will Not Affect the Liability of the Maker of
the Collateral Note.**

Does the renewal of a note secured by collateral affect a bank's right as the holder of the note pledged as collateral, the principal note being renewed from time to time after the note pledged becomes due?

I do not see how the renewal of a note could make any difference to the maker of the note which is held as collateral. The rule is that the holder of collateral must exercise ordinary diligence in collecting collaterals pledged, and the failure to exercise such diligence discharges the pledgor; but the failure to collect promptly would not affect the liability of the maker of the note which has been pledged as collateral, and the renewal of the principal note would have no effect on the liability of the maker of the collateral note. Usually, it would not seem to be good policy to continue to renew a note after collateral has become due, and remains unpaid, as the failure to pay the collateral note would seem to indicate that it is of doubtful value; but I do not think the renewal could in any way affect the liability of the maker of the note pledged as collateral, the question as to whether renewal should be made being merely a business question, the legal status not being affected in any way by the renewal.

Where Proceeds of Sale of Collateral Are Sufficient to Cover Principal and Interest on Original Note, Adjudication in Bankruptcy Does Not Stop Running of Interest.

Does the rule that bankruptcy stops interest on claims against the bankrupt from the date of adjudication apply to secured claims, where the amount of the collateral held as security is more than sufficient to pay both principal and interest on the claim?

The Supreme Court of the United States in the case of *Coder, Trustee, v. Arts*, 213 U. S. 223, 53 L. Ed. 772, held that a mortgage creditor, where the property covered by the mortgage sold for a sum sufficient to pay both principal and interest of the mortgage debt, was entitled to collect interest up to the date of the sale of the mortgaged property. The same rule would apply to a claim secured by collateral. Where, however, the collaterals or other securities bring less than the amount of the debt, the creditor is not authorized to apply the proceeds first to the payment of interest, and then as a credit upon the principal, and prove his claim in bankruptcy for the difference. In such cases the running of interest stops with the adjudication of bankruptcy, with this proviso, however, that interest and dividends upon securities held by creditors accruing after the date of the petition in bankruptcy may be applied to the future accruing interest upon the debt. This was held by the Supreme Court of the United States in *Sexton v. Dreyfus*, 219 U. S. 339, 55 L. Ed. 244.

Rights of Holder of Collateral on Bankruptcy of the Pledgor.

Can a creditor holding a note secured by collateral prove his debt for the full amount in a bankruptcy proceeding against his debtor, proceed to realize on his collateral, and collect dividends on the full amount of his claim? Or is it necessary for him to account for his collateral and collect dividends on the balance?

A creditor holding a secured debt may (a) realize on the security according to the terms of the contract, credit the same on the debt and prove his claim for the balance; or (b) prove his claim for the full amount as an unsecured debt, surrendering the collateral to the trustee for the benefit of the estate; or (c) he may prove his debt as a secured debt, have his collateral valued and credited upon the claim, and collect dividends on the excess. He can not prove the claim as an unsecured debt, collect dividends on the full amount, and yet hold on to his collateral. This seems to be very clearly provided by § 57 of the Bankruptcy Act. See *Collier on Bankruptcy*, pp. 721 *et seq.*

Holder of Collateral Pledged by Bank May Collect Collateral Upon Insolvency of Bank.

A bank borrows from its correspondent, pledging certain of its customers' notes as collateral. Before it liquidates its indebtedness a receiver is appointed for it. Has the correspondent bank the right to collect the collateral notes which it holds, or is it compelled to turn over the collateral to the receiver of the insolvent bank?

There can be no doubt as to the right of the bank to hold this collateral and itself undertake the collection of it; and, generally speaking, this would be much better than undertaking to collect through the receiver. It is a general custom for correspondent banks to undertake to make their own collections. Sometimes a receiver agrees to assist in making the collection, but where he does so he accounts to the correspondent bank. His collections are entirely outside of his trust as receiver.

Collateral Pledged to Secure Specified Note and "All Other Indebtedness" May Be Held Until All Debts Satisfied.

Where a collateral note recites that certain described papers are deposited as general collateral for the payment of such note and of any other existing or future liability of the maker to the payee or holder, does the collateral cover any other indebtedness than that represented by the note itself?

Some such clause is usually adopted by banks in their collateral notes, and such a clause is valid. Under it a bank would be authorized to hold the collateral to cover any indebtedness of the maker of the note, although the indebtedness represented by the note itself might have been paid. I quote from a decision of the Supreme Court, which seems to settle the question:

"Where one borrows money from a bank, and in the note given therefor pledges certain collaterals for the payment of that note and for 'any general balance due or to become due' the bank, the borrower has no right to withdraw the collaterals without the consent of the bank, on payment or tendering payment of the note only, if the bank is the holder of other just demands against him not then fully secured otherwise, according to sound business principles and the rules of practical banking." Merchants National Bank of Savannah *v.* Demere, 92 Ga. 735 (3).

Collateral Pledged to Secure All Indebtedness Would Secure Indorsements.

Would the clause in a note, "We have deposited with said payee, as collateral security for this note, and any other present or future indebtedness of ours of any character to said payee or holder, the following collateral," be sufficient to cover the maker's indorsement, either on papers discounted by him or accommodation indorsement on notes of others?

The language is quite broad, and would seem to be intended to cover just what it says, "any other present or future indebtedness of any character." As an indorsement is an indebtedness, I think the form would be sufficient to cover liability as indorser on papers discounted or held by the bank.

Sale of Collateral Under Power Contained in Note Valid if Terms of Power Strictly Followed.

Where cotton is pledged to secure a note, warehouse receipts being turned over to the bank, and where the note provides for a sale of the collateral, can the cotton be sold under the power in the note?

Under the usual form of collateral note, the bank would have authority to exercise the power and to sell the cotton, where the maker of the note was in default, as provided by the note. Care should be taken to follow strictly the terms of the power; but where this is done and a fair and regular sale is made, the bank would be protected in making the sale and applying the proceeds to the satisfaction of the note.

Sale Under Power in Note May Be Public or Private and Without Notice When so Agreed.

Is there any decision by our courts in regard to selling collateral at public or private sale without notice to the maker, security or indorser, such sale being authorized by the pledge agreement contained in the note to secure which the collaterals are pledged?

The Supreme Court has upheld such a sale in the case of *Thornton v. Martin*, 116 Ga. 115 (3), from which I quote:

"Where the pledgee is authorized, on or after the nonpayment of the note at maturity, to sell the stock at public or private sale, without advertisement or 'giving any notice' to the maker and pledgor, the sale is not invalid when made without demand and without notice of the time or place of sale, although not made until long after the maturity of the note. Where there is no valid extension of the note, the waiver of notice is not affected by mere delay in exercising the power of sale."

Advertisement of Sale in Sunday Newspaper Invalid.

Would advertisement in a Sunday paper be legal under a provision in a collateral note providing for certain advertisement in order to sell?

This question seems to have been expressly ruled in the case of *Sawyer v. Cargile*, 72 Ga. 290, from which I quote:

"Sunday is *dies non juridicus*, and service cannot be made, or legal notice given on that day, or the business or work of ordinary callings done. Therefore, the publication of the advertisement of a marshal's sale for taxes in a newspaper appearing on Sunday was not legal, and the sale thereunder passed no title."

COLLECTIONS.**General Rules Governing Liability.**

D. & Co. deposited with the G. Bank their draft on the A. Bank. The bank forwarded the item for credit to the F. Bank in another city, which bank turned the draft over to the clearing house in that city for collection. The clearing house forwarded the draft direct to the A. Bank. This bank made settlement with the clearing house in New York Exchange. Before this could be collected in due course the A. Bank was closed and the exchange dishonored. What are the rights of the several parties under the facts stated?

(1) D. & Co. are fully relieved from liability. I quote from a decision of the Supreme Court:

"Where one gave to another, in payment of a debt, a check upon a bank at which he had on deposit sufficient money to meet the payment of the check, and the payee deposited the check for collection in another bank, which immediately forwarded it to the drawee bank for payment, an entry on its books by the drawee bank charging the account of its depositor with the amount of the check was equivalent to the payment thereof. The drawee bank then held the amount of the check as the agent of the payee, and the drawer was discharged from liability on the debt for which the check was given." *Smith Roofing & Contracting Co. v. Mitchell*, 117 Ga. 772

D. & Co. having deposited the check as cash, and it having been presented to the bank on which it was drawn, and charged to their account, the check was paid and D. & Co. relieved of further liability.

Of course, if the G. Bank had a contract with D. & Co. that items taken for credit were at their risk, and that if returns for such items should be dishonored, the amounts could be charged back to their account, they would not be relieved. In the ab-

sence of such contract D. & Co. seem clearly to be relieved of liability.

(2) The respective rights and liabilities of the G. Bank and the F. Bank depend upon the terms on which the draft was forwarded and acknowledged by the F. Bank; that is to say, upon the terms of the contract between the two banks.

"In the absence of a contract, express or implied, to the contrary, a bank taking paper for collection is liable for the defaults of its agents and correspondents to whom the paper has been entrusted for collection." Park's Ann. Code, § 2362.

"Where * * * a bank received for collection from a customer a check which by the exercise of proper diligence might have been collected, it became, in the absence of any express or implied contract to the contrary, liable for any neglect of duty whereby the collection of the check was defeated, whether such negligence arose through the default of its own officers, or from that of its correspondent or agent to whom it may have sent the check for collection, and in such case, it would be immaterial whether such correspondent or agent was the bank upon which the check was drawn or another." *Bailie v. Augusta Savings Bank*, 95 Ga. 277.

In the absence of a contract limiting its liability, the F. Bank is liable to the G. Bank for any neglect of duty in the collection of the check by itself or the clearing house, which was its agent, or the A. Bank.

It is almost universally held that it is negligence in a collecting bank to send a check for collection directly to the bank upon which it is drawn.

"If a bank receiving paper for collection, payable at a distant place, sends it by mail to the payer for collection, it is guilty of negligence, and this, too, though the payer is the only bank in the place, and though it is customary thus to send paper for collection, since the custom is unreasonable." *Michie on Banks and Banking*, Vol. II, p. 1405.

The question has never been decided in Georgia, though it was raised in the *Bailie* case above referred to, the court there expressly declining to decide it; but there appears to be little conflict on the proposition in other jurisdictions.

The general rule also seems to be that a collecting bank is not authorized to receive anything except money in payment, and if it takes a check which is dishonored, it is liable for so doing. The only exceptions are where the bank has special authority to receive something other than money, or where there is a general custom to receive something else, which custom is known to the

depositor, or is so universal as to authorize the assumption that he knew of it.

"In the absence of special authority or well-established custom to the contrary, a bank with which paper is deposited for collection has no authority to accept anything but money as payment. It can only receive payment of the debt due the principal in the legal currency of the country, or in bills which pass as money at their par value by the common consent of the community. Thus, for instance, a bank receiving paper for collection has no authority to accept a check in payment thereof, even though such check be certified.

"It has been held, however, in a number of jurisdictions that a collecting bank may properly accept payment other than money by virtue of special authority from its principal or custom known to such principal or obtaining so universally that the holder of the paper will not be allowed to plead ignorance of it." 2 Michie on Banks and Banking, pp. 1395-1398.

"Where a bank accepts a check on another bank in payment of a draft in its hands for collection and surrenders the draft, it makes the check its own, and its liability is the same as if cash had been received." *National Bank v. American Exchange Bank* (Mo.), 52 S. W. 265; *Fifth National Bank v. Ashworth* (Pa.), 2 L. R. A. 491.

There is no Georgia case on this precise point, but it has been held that

"Where a bank sends an accepted draft to a correspondent for collection, who receives in payment the check of the acceptor on itself in the regular course of business, the acceptor being a depositor with the collecting bank and having on deposit a sum in excess of the check, and the collecting bank surrenders the draft to the acceptor, and remits its own check to the initial bank, which check is not paid because of the failure of the remitting bank, such transaction constitutes a payment of the draft as between the drawer and the acceptor, although the collecting bank may have been insolvent at the time, its insolvency not being known to its officials or the depositor." *Pollak Brothers v. Niall-Herlin Co.*, 137 Ga. 23.

Under these authorities, when the F. Bank accepted New York Exchange and surrendered the draft, it took the risk of the New York check being paid. The draft was absolutely satisfied, and if the New York check was dishonored for any reason, the risk was that of the F. Bank as between it and the G. Bank.

Another element possibly is the delay in presenting or reporting on the draft. The rule is that a check must be presented for payment within a reasonable time, and if the bank fails between the time of drawing and the presentation of the check,

the drawer is discharged from liability to the extent of the injury he has sustained by such failure.

"What is a reasonable time will depend upon circumstances, and the relation of the parties between whom the question arises." *Comer v. Dufour*, 95 Ga. 376, 378.

If the delay in presenting the check was occasioned by its being routed via F. Bank instead of being sent directly for collection to the town in which A. Bank was located, then in order to escape liability to its depositor for failing to present the check at the bank on which it was drawn within a reasonable time, G. Bank would have to show that it was usual and customary to so collect checks deposited for collection. Each case must depend upon its own facts both as to whether or not there was delay and whether or not the route selected was so unreasonable as to amount to negligence on the part of the bank or its correspondents.

"Checks on out-of-town banks, which are deposited with a bank for collection, must of necessity be collected through the agency of intermediary or correspondent banks. * * * It should follow that a collecting bank is not guilty of negligence and does not render itself liable to its depositor where it forwards his check through one or more correspondent banks for collection, provided the check is sent in a reasonably direct manner and arrives at its destination for presentment within a reasonable time." *Brady on Law of Bank Checks*, § 200.

(3) On account of our statute above quoted, making a collecting bank liable for the negligence of its agents or correspondents, it is customary with most of the banks to have printed on their deposit tickets, and frequently in their pass books, a notice that items payable outside of the city in which the bank is located, are taken at the depositors' risk, and that the bank assumes no responsibility for neglect or default of collecting agents.

It is also customary for banks doing any considerable amount of collecting to have printed on their acknowledgments some similar expressions, frequently adding that items may be sent to banks on which they are drawn, and that if returns sent by the collecting agents are dishonored, the amount may be charged back. It is generally held that such notices amount to a contract and relieve the bank from liability for neglect or default of their correspondents, and authorize the charging back of items.

"In a State wherein a bank is responsible for the conduct of a subagent, it may by notice in a pass book absolve itself from the negligence of the subagent." *Bolles on Modern Law of Banking*, p. 576.

"Where defendant bank had been acting as plaintiff's collection agent for some time, with the understanding that it should not be liable for the misconduct of its subagents, and on receipt of the item in question for collection in accordance with its uniform prior practice acknowledged receiving the check and incorporated in the body of the receipt a statement that in receiving the same it acted only as agent, and assumed no responsibility for the acts, omissions, neglect, or default of agents or subagents at other points, or for items lost in transit, it was not liable for the failure to collect the check, due to the negligence of a subagent." *California National Bank v. Utah National Bank*, 190 Fed. 318 (8 C. C. A.).

The Supreme Court of Georgia holds, however, that it is a question for the jury in each case from the course of dealing between the parties as to whether there was an implied contract exempting the bank from responsibility for neglect upon the part of its agents or correspondents through whom it endeavors to collect a check which has been deposited with it for collection. *Youmans Jewelry Co. v. Blackshear Bank*, 141 Ga. 357.

In the case of a savings bank, the court held

"A depositor in a saving bank is bound by the reasonable rules of the bank to which he assents by an agreement in writing." *Langdale v. Citizens Bank of Savannah*, 121 Ga. 105.

If the F. Bank in its letter acknowledging receipt of the draft protected itself by a notice similar to that above referred to, and the notice authorized it to forward the check to the bank on which it was drawn, and provided for the charging back of such items as might be dishonored, it would be relieved of liability and authorized to charge the item to the G. Bank. If it did not protect itself by such a contract or notice, it would be liable, and would not have the right to charge the item back.

If the F. Bank is authorized to charge the item back to the G. Bank, whether it could in turn charge it to D. & Co. would depend on whether or not it had a contract with D. & Co. which would authorize it to do so. For, as above stated when D. & Co.'s draft was presented to the A. Bank and charged to its account, it was paid, and they were relieved of further liability, unless there was a contract which authorized charging back the item in the event checks taken in payment should be dishonored.

Note.—The foregoing opinion correctly states the law governing the collection of checks prior to the passage of the Banking Act of 1919, effective January 1, 1920. This act, however, has materially modified the banks' liability.

§ 179. "When a check, draft, note, or other negotiable instrument is deposited in a bank for credit, or for collection, it shall be considered due

diligence on the part of the bank in the collection of such check, draft, note or other negotiable instrument so deposited, to forward and route the same without delay in the usual commercial way, according to the regular course of business of banks, and the maker, indorser, guarantor, or surety of any check, draft, note, or other negotiable instrument so deposited shall be liable to the bank until actual final payment is received; and when a bank receives for collection any check, draft, note, or other negotiable instrument and forwards the same for collection as herein provided, it shall be liable only after actual final payment is received by it, except in case of want of due diligence on its part as aforesaid."

§ 180. "Any bank, or banker, doing business in this State, receiving for collection or deposit, any check, note or other negotiable instrument drawn upon or payable at any other bank, located in another city or town, whether within or without this State, may forward such instrument for collection directly to the bank on which it is drawn or at which it is made payable, and such method of forwarding direct to the payor shall be deemed due diligence, and the failure of any such payor bank, because of its insolvency or other default, to account for the proceeds thereof, shall not render the forwarding bank liable therefor; provided, however, such forwarding bank shall have used due diligence in other respects in connection with the collection of such instrument."

Correspondent Bank Liable to Forwarding Bank for Delay in Tracing and Reporting on Items Sent It for Collection.

A bank sends to its correspondent for collection and credit a number of checks drawn on different localities. These items are properly credited, and the forwarding bank so notified. After a year elapses the correspondent bank advises the forwarding bank of the loss of one of the checks, and requests duplicate. Duplicate can not be secured, and the correspondent bank then notifies the forwarding bank that it will charge the amount of the check to its account. Has it the right to make such a charge?

A bank which acts as collecting agent for another bank must use reasonable diligence and care, and if in consequence of a failure to do so a loss occurs, it is liable. This is the well-recognized and established rule. Quoting from Morse on Banks and Banking, § 252:

"If a bank fails to do its duty in the matter of collection with reasonable skill and care, it is liable for the damage resulting to any party interested in the paper, whether his name appears on the paper or not."

Reasonable diligence requires that a bank undertaking collection of checks must ascertain within a reasonable time whether checks are paid, and, if not, advise the customer from whom the check was received to that effect, and a delay in making such inquiry and failure to notify the party interested imposes a liability if loss is thereby occasioned. In one case it was held that a delay of fifteen or sixteen days in making inquiry and giving notice was inexcusable, and that the bank was liable. *First National Bank of Trinidad v. First National Bank of*

Denver, Fed. Cases, No. 4810. In another case a delay of twelve days in discovering the loss and of fourteen days in notifying the forwarding bank was held sufficient to charge the collecting bank with negligence and to render it liable, a loss having resulted. *Shipsey v. Bowery National Bank*, 59 N. Y. 485. Both of these cases are cited with approval by Mr. Morse in the section referred to above.

Of course, if the loss of the check resulted from the negligence of the correspondent bank itself, it would undoubtedly be liable for any damage which might be occasioned thereby, and under the authorities above cited, if the loss occurred in the mails or entirely without the fault of the correspondent bank or its agents, it would still be liable for its failure to follow up the check, ascertain the loss, and report to the forwarding bank. The correspondent bank, therefore, would not be authorized to charge to the account of the forwarding bank the amount of the check, for the loss of which it was responsible.

Bank May Require Identification of Party Indorsing Name of Payee, Although One of Its Regular Customers, Upon Check Forwarded Through Another Bank, and Is Not Liable for Loss Resulting from Delay Caused Thereby.

A bank issued a cashier's check to a regular customer, which was subsequently forwarded to it by another bank with this indorsement: "For collection. Pay on signature only. Party is stranger to us." The bank issuing this check had the customer's signature on file, but was not entirely sure the indorsement was genuine. If such bank paid the check, could it hold the forwarding bank liable in the event the indorsement proved to be a forgery? Could the bank issuing the check decline payment until the customer was properly identified and be relieved of liability to him for any loss resulting from the delay caused thereby?

I do not think the bank forwarding the check could be held liable. It did not cash the check, but simply sent it to the bank issuing it for collection, putting such bank on notice by its indorsement on the check that it did not cash it and did not undertake to guarantee the genuineness of the signature. Where a bank cashes a check drawn on another bank, it is supposed to have the party to whom it pays the money properly identified before making payment, and when it indorses the check it guarantees all prior indorsements. But in this case the check does not seem to have been cashed, but simply accepted for collection and forwarded with the information that it had not been cashed and that the forwarding bank was undertaking simply to collect for a party

whose signature it could not vouch for and for the genuineness of which it assumed no responsibility.

A bank is expected to know its depositors' signatures and to take the risk of paying on forged signatures. This applies, however, to signatures on the customers' checks rather than to their signatures on other papers. I do not think there would be any burden on a bank to know the indorsement of a party, although he might happen to have a deposit account with it and his genuine signature might be on file. This signature would generally afford the means of determining whether or not an indorsement was genuine, but if the bank were doubtful about the signature I think it would be justified in holding the check until the genuineness of the indorsement could be established. And if there was any reason to doubt the genuineness of the signature, and the bank held the check in order that the signature might be properly identified or its genuineness established, I do not think it would be liable for damages occasioned by this delay, assuming, of course, that it exercised reasonable diligence to secure the identification promptly.

CONDITIONAL BILL OF SALE.

Conditional Bill of Sale Retaining Title to Personality Cannot Be Treated as a Mortgage or Foreclosed as Such.

A conditional bill of sale retaining title to personal property sold, also contains a provision authorizing the vendor to treat the instrument as a mortgage and to foreclose the same in the way that chattel mortgages are foreclosed. Is this option in the instrument valid and enforceable?

It is not, the Supreme Court of Georgia has decided:

"Where sellers of personal property took from the buyer a written instrument promising to pay the unpaid purchase money and agreeing that the title to the property should remain in the sellers until payment in full, and in the instrument was inserted an agreement by the buyer, that upon default in payment the sellers might, 'in addition to any other remedies provided by law for the enforcement of the collection hereof, at their option elect to treat this instrument as a mortgage upon the property title to which is retained by the said (sellers) by the terms hereof, and upon the execution of a bill of sale to the maker or makers hereof to such property, and the filing and recording of such bill of sale in the office of the clerk of the Superior Court * * * shall give the right to the said (sellers) to proceed to foreclose this instrument as a mortgage upon said property, together with the other property

herein mortgaged, in the same manner as mortgages upon personal property are foreclosed under the laws of this State, the parties could not by such an agreement make the instrument one both retaining title and not retaining title; nor could they by such agreement make a summary statutory proceeding applicable by law to one character of instruments applicable by agreement to another." *Wynn & Robinson v. Tyner*, 139 Ga. 765 (2).

It should be remembered that bills of sale to secure debt, where the amount secured is less than \$100, can be foreclosed as chattel mortgages under the statute. *Park's Ann. Code*, § 3298.

CONFEDERATE MONEY.

Passing Not in Violation of United States Statutes.

What is the penalty for passing or attempting to pass Confederate money?

In answer to this question I quote first from a case decided some little time ago by a Federal court sitting in North Dakota:

"The passage of a Confederate bill as money is not a violation of the fourth clause of Rev. St. § 5430, which makes it an offense for any person, except under authority of a proper officer, to have in his possession 'any obligation or other security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same;' but, to constitute a violation of such provision, the instrument used must in its inception have been intended to simulate some obligation or security of the United States. The general likeness which one form of paper money bears to another is not sufficient." *United States v. Barrett*, 111 Fed. 369 (1).

In another case it was held:

"An ordinary Confederate States five dollar note does not bear to the national currency the 'similitude' contemplated in Rev. St., § 5430, notwithstanding such notes are frequently accepted by mistake as money." *United States v. Kuhl*, 85 Fed. 624 (D. C. Iowa).

In the case last cited it was held also that a Confederate bill might, if it bore a marked similarity to national currency, violate the statute of the United States, but that the ordinary Confederate note did not bear such similarity.

While it would not be a violation of the statute of the United State ordinarily to pass a Confederate bill, such money might be

used to perpetrate a fraud, and might be punished under our statute against cheating and swindling, the statute being broad enough in its terms to cover any means or device by which one person defrauds, cheats, or swindles another. Passing such money on a very ignorant person who could not read and who, therefore, would not be able to tell that the bill offered was a Confederate bill, or on a blind person, would be such a fraud. The fact that the bill was a Confederate bill would make no difference. Passing any kind of paper on another person as money would be the same thing.

CORPORATE STOCK.

Transfer of Not Affected by Judgments Against Vendor.

Was not a law recently passed making corporate stock negotiable? Is it necessary in lending upon stock to examine the records to see whether there are judgments against the parties owning the stock?

I know of no recent act on the subject. The last statute was passed in 1894 and is found in § 6036, Park's Ann. Code. Under this statute corporate stock is of a *quasi* negotiable character. After being indorsed in blank it may be transferred freely from hand to hand practically as a negotiable instrument, and the purchaser or pledgee can hold regardless of a judgment against the original owner, although that judgment may have been entered prior to the transfer.

The following quotation is from the case of *Owens v. Atlanta Trust and Banking Company*, 122 Ga. 521, 523:

"Stock in a corporation is a *chase* in action. In the absence of a statute it would not be subject to levy or sale. By the Act of 1822, the lien of a judgment against the shareholder attached from the date of its rendition, but had to be kept alive by giving notice within twenty days to the corporation. This policy is reversed by the Civil Code, § 6035. The lien now does not attach to the stock upon the rendition of the judgment, but only after notice acting as a sort of garnishment on the corporation, or withholding the lien until levy as under the Civil Code, § 3701. Until this notice is received the statute recognizes that the company may make transfers notwithstanding the existence of a judgment against the shareholder. The *quasi* negotiable character of stock, the fact that certificates indorsed in blank may and do pass from hand to hand, and the necessity of preserving the rights of that large body of the public who buy and lend on

the faith of shares, was no doubt the reason for the change made by the Code in the Act of 1822."

Under this decision, it would not be necessary for a bank to examine the execution dockets to determine whether judgments had been rendered against the pledgor of stock.

Corporate Stock When Transferred as Collateral Should Be Accompanied by Power of Attorney.

Where corporate stock is transferred as collateral is a simple indorsement of the stock sufficient, or is it necessary that a power of attorney, such as is usually printed on the back of a stock certificate, should be signed?

A power of attorney should be given. This power can be left in blank, however, having only the signature of the stockholder, which should be witnessed. It is not necessary that the power of attorney on the back of the certificate should be signed. A separate power of attorney can be given and attached or filed away with the certificate. There is usually, however, no reason why the regular form of power of attorney on the back of the certificate should not be used.

COUNTY LOANS.

County Authorities Have No Power to Borrow Money for Current Expenses.

Can county commissioners lawfully borrow a sum of money on their note payable December 31 of the current year, the transaction being for the purpose of raising money to cover running expenses of the county for the year and also old debts?

The precise question has been decided by the Supreme Court, the Court having held distinctly that the county commissioners have no such authority. I quote from the case of *Butts County v. Jackson Banking Company*, 129 Ga. 801:

"County commissioners have no authority to contract in behalf of a county for a loan of money (not to supply a casual deficiency of revenue) to be used in defraying current expenses, although the notes which evidence the loan be payable within the current year, and the general design be to discharge them from the anticipated revenue of that year."

In discussing what are "casual deficiencies of revenue" for which a county may borrow money without the approval of the qualified voters at an election regularly held for the purpose, the court in *Lewis v. Lofley*, 92 Ga. 804, says:

"The word 'casual' means that which happens by accident or is brought about by an unknown cause; and we think the framers of the Constitution, in using this language, meant some unforeseen or unexpected deficiency, or an insufficiency of funds to meet some unforeseen and necessary expense."

In the case of *Hall v. Greene County*, 119 Ga. 253, the court held that loans made to pay court and jail expenses, expenses of working a chain-gang on public roads, and other current expenses, the money having been borrowed to be repaid within the year from the taxes of that year, were unauthorized. Quoting from the opinion:

"There is no authority whatever in our law authorizing county authorities to make any such loans as the one disclosed by this record."

The paragraph of the Constitution covering the subject was directly under consideration by the court in the cases above cited. The paragraph provides in terms that no new debt shall be incurred, except for temporary loans to supply casual deficiencies of revenue, without the assent of two-thirds of the qualified voters at an election held for the purpose. The same paragraph applies to municipal corporations. In construing this section, in a case brought against a municipal corporation, the court in *Tate v. Elberton*, 136 Ga. 302 (3), says:

"This does not authorize municipal authorities to borrow money (not to supply casual deficiencies of revenue) for the purpose of using it during the year in defraying current expenses as occasion may arise, and to give notes therefor."

COUNTY WARRANTS.

Order of Payment.

In what order must a county treasurer pay warrants issued by the county commissioners?

The method of handling county warrants is prescribed by § 579 Park's Ann. Code, which I quote:

"When there are funds enough to pay all outstanding orders and other forms of indebtedness due, which the treasurer may be

authorized to pay, they may be paid indiscriminately without regard to their dates; when there is enough to pay all dated anterior to some particular dates, all such may be likewise paid indiscriminately; when there is not enough to pay all of equal degree, they shall be paid ratably; under all other circumstances, they shall be paid in the order of their dates."

I quote also §§ 581 and 582 in reference to orders carried over from one year to the next:

"If any person holding county orders shall fail to present them by the first day of December of each year to the county treasurer for payment, they shall be postponed to all orders which were so presented and not paid for want of funds."

"On the first day of December of each year such treasurer shall make an entry of all orders entitled to payment which were not so presented for payment, and what orders not of equal dignity have been paid instead, in whole or in part, and what others are entitled to payment before such nonpresented orders. Persons holding such orders, who present them without receiving their pay before said day, may have the treasurer annually to mark thereon 'presented,' the day of presentation, and 'not paid for want of funds.'

These three sections of the Code fully answer the question.

Warrants Do Not Bear Interest?

Do county warrants bear interest?

No. The question has been expressly decided in the case of the First National Bank *v.* Owens, 147 Ga. 599.

Rule changed, 7 per cent interest provided. Act 1920, page 65

School Warrants to Pay Teachers' Salaries Are Valid.

Are school warrants issued by county boards of education valid?

These warrants are issued under authority of an act of the legislature passed in 1910, Park's Ann. Code, § 1548 (a), which gives to the county boards of education of the several counties the authority to borrow a sufficient amount of money to pay the salaries of teachers in the public schools of their counties for the current school year, the authority being limited to the amount to which the county may be entitled from the public school fund. In order to be valid, these warrants must be authorized by a resolution of the board of education entered upon its minutes, the resolution stating the amount of money to be borrowed, the length

of time, the rate of interest, the purpose of the loan and the name of the lender. The notes must be signed by the president of the board of education and the county school commissioner. If the warrants are drawn in accordance with the statute, the loans are valid and collectible.

Whether Warrants May Be Applied to Payment of Taxes Not Decided.

Would county authorities be obliged to receive in payment of taxes county warrants given for labor and merchandise?

Apparently the question has not been decided by the courts in Georgia. The Cyclopediа of Law and Procedure, Volume XI, p. 542, says:

"County warrants have been held to be receivable in discharge of county or city revenue, license, tax, assessment, fine, penalty, or forfeiture, etc."

The cases cited in support of the text, however, seem all to depend on the statutes of the particular States. In a number of States it is expressly provided that county warrants shall be receivable for taxes and other governmental charges. I believe that every case cited in support of the text depends on one of these special statutes. Therefore, they are without any real bearing on the question.

I doubt very much whether, except where provided by statute, a county warrant may be offset against a claim for taxes. These warrants are not notes or obligations of the county, but are simply orders of the ordinary or commissioners of the county on the treasurer, and are given primarily to advise the treasurer that the account of the holder of the order has been properly authorized, audited and allowed, and, therefore, that the treasurer is authorized to pay it. The orders are not payable at any fixed time, it being contemplated that they shall be paid on presentation, provided the treasurer has funds, and if not he is to note the fact on the warrant; and such warrants as are not presented by the first of December are postponed to those which are so presented.

There is nothing in the statute authorizing these warrants or orders to be given to indicate that it was contemplated that they should be used in the payment of claims against the county or were themselves to be regarded as the obligations of the county. As stated, they seem to be mere evidence for the benefit of the

treasurer that the accounts which they represent are proper claims against the county, and they are his authority for making payment thereof.

It should be remembered, too, that the tax collector collects not only the county tax, but also the State tax. It would hardly do to say that a county warrant could be used to pay the State tax, and I fear if they were used to pay the county tax, separate and apart from the State tax, considerable confusion might arise in the handling of the county affairs. Such use of them would probably permit one debtor of the county to receive payment of his claim in preference and priority to other creditors holding claims of equal dignity.

But as above stated, the question does not seem to have been decided in Georgia, and there is no way to tell just what the courts would hold in the event the question were raised. There would be very good argument for the position that the taxpayer to whom the county was indebted should not be required to pay his tax and wait on the county to meet its obligation to him, but that the one claim should be offset against the other.

CREDIT STATEMENTS.

Advantages of.

What is the advantage to a bank in securing credit statements from its customers?

I am a great believer in a bank securing statements to be used as a basis for fixing lines of credit. Such statements give information in a permanent form, which could hardly be obtained by conversation with the customer. And even if the customer in conversation gave the bank essentially the same facts as he put in the statement, he would perhaps not be so accurate in these verbal statements as he would be if required to reduce the statements to writing. Then, too, in the absence of a written statement, it would be simply a question of recollection between the bank and the customer as to what the customer actually said; whereas, if the bank has it in writing over the customer's own signature, there can be no doubt as to what his statement was.

Another advantage in securing credit statements is the fact that obtaining credit on the strength of a written statement, which is

materially false, could be made the basis of a criminal prosecution, or to defeat a discharge in bankruptcy.

Such a statement should show not only the customer's assets and liabilities in detail, but all other facts in connection with his business, as, for instance, the volume of business done, the amount of cash and credit sales, the expenses, margin of profit, and any and all other matters which would enable the banker to determine whether or not the business being conducted is a profitable one or one likely to succeed. Where the business is that of a partnership or a small private corporation, statements as to the individual assets and liabilities of the partners or officers of the corporation should also be required. In giving the liabilities the customer should be required to show what these liabilities represent, whether for the purchase of merchandise, borrowed money, or outside indebtedness of any sort, how much of this indebtedness is due, whether any of it is secured, and how. Similar detail information as to assets should be required. With such a statement as this, the banker may intelligently fix a line of credit. He may also in many cases be of material benefit to the customer, pointing out to him wherein his business is not being properly conducted or wherein its weakness lies, getting him to cut off this or that expense, to get this indebtedness shaped up and carried in better form.

Where such statements are kept from year to year, a comparison of the statements will enable the banker to determine whether the business is making any headway, and whether or not the demands and requirements of the customer are proper or necessary for the conduct of the business. A bank frequently does a customer injustice by giving him a too liberal line of credit, and many a failure, resulting not only in disaster to the customer but loss to the bank, would be avoided by keeping the customer within proper limits. This can best be done by a careful study of his business needs and requirements, which can only be made from carefully compiled information in regard to the financial condition of the business. One of the great troubles with many business houses is that they do not know their own condition, and so long as they can get credit from the bank they continue to do business, frequently getting deeper and deeper in debt, and finally fail, generally subjecting the bank to considerable loss, when, if they had known what the true condition was and had their line of credit limited to real requirements, they would probably have been successful.

CROP MORTGAGES.

**Mortgage on Crop for Supplies Superior to Older Judgment.
How Crop Subject to Both Should Be Handled.**

It being provided in § 3349 of the Code that mortgages given to secure advances for supplies in making a crop are superior to judgments, although of older date, how can a crop, which is subject to such mortgage and also to judgments, be safely marketed?

The effect of this section is simply to postpone judgment liens to the liens of mortgages for supplies. The section does not divest the judgment liens, but leaves the crop subject to them in the same way and to the same extent as it was before, merely postponing the judgment to the mortgage. The situation is precisely the same as though after the mortgage was given a judgment should be obtained against the mortgagor and properly recorded.

A mortgage is only a lien upon the property covered thereby, and does not convey title. A judgment is also a lien. The Supreme Court has held that a judgment lien can not be divested by a subsequent conveyance of property, although such conveyance is made in satisfaction of a prior mortgage lien. I quote from the case of *MacIntyre v. Ferst's Sons & Company*, 101 Ga. 682:

"Where a creditor whose debt is secured by mortgage, in satisfaction of such debt, takes a conveyance of the property mortgaged, such conveyance is not effectual to vest in him a title which would prevail upon the trial of a claim afterwards filed by such creditor to prevent the sale of such property under an execution issued upon a judgment junior to the mortgage but older than the deed."

It will be seen from this decision, therefore, that where there are judgments against the mortgagor of a crop, the holder of the mortgage can not take the crop and apply it in satisfaction of his debt, so as to defeat the judgment, although his lien may be superior to the lien of the judgment. The only way that a judgment lien can be divested would be by a foreclosure of the mortgage and a sale of the property. As the cotton would be subject, both to the lien of the mortgage for supplies and also to a duly recorded judgment, it could not be pledged either directly or by the hypothecation of a warehouse receipt, so as to defeat the lien either of the mortgage or the judgment, and, of course, it could not be sold so as to defeat either lien.

It is probably well to remember that § 3349 only makes superior to older judgments a technical mortgage, and it has been held that a bill of sale given to secure a debt, although the debt is for supplies furnished to make a crop, is not superior to older judgments. I quote from a decision by the Court of Appeals:

"The lien of a judgment duly recorded on the general execution docket is, after the maturity of a growing crop of the defendant in *f. fa.*, superior to the title thereto obtained through a bill of sale to secure a debt, executed by the defendant in *f. fa.* to a third person after the judgment is recorded, but before the crop is mature.

The Act of December 21, 1899 (Park's Ann. Code, § 3349) providing that mortgages given to secure supplies necessary to make a crop shall be superior to older judgments, does not include within its purview bills of sale given to secure such supplies." *Hixon v. Callaway*, 2 App. 678.

Crop Mortgages Must Be Attested as Mortgages on Real Estate.

Does a crop mortgage in Georgia require two witnesses, one of whom must be a duly authorized officer?

My information is that crop mortgages in Georgia are ordinarily attested as are chattel mortgages, crops being popularly considered as personal rather than as real property. The legal status of a growing crop has given rise to much uncertainty and contradiction in the law. The decisions are spoken of by Chief Justice Simmons as constituting a "mystic maze." The Chief Justice says:

"We are free to confess, about the only deduction we have been able to draw therefrom is that a growing crop is a sort of legal species of chameleon, constantly changing color to meet the emergency of each particular class of cases in which the question arises whether it is to be considered as personality or as realty." *Bagley v. Columbus Southern Railway Company*, 98 Ga. 626.

In this case, which involved the sum of \$6.00, it required an opinion of twenty printed pages for the Supreme Court to reach the conclusion which it finally did, that a crop in Georgia is a part of the land upon which it is growing, and is not personal property. This decision has been several times followed by the Supreme Court and the Court of Appeals.

The last reported case, decided February 13, 1919, is that of *Newton County v. Boyd*, 98 S. E. 347, in which it is said:

"A crop of corn not detached from the soil, whether mature or immature, is a part of the realty and passes, by sale of the land, without contractual reservation of the crop."

A crop under these decisions being a part of the land is regarded as real property and not as personal property. Under the Code, a mortgage of land, or any interest therein, must be attested by two witnesses, one of them being an officer. Crop mortgages must, therefore, be attested like any other mortgages of real estate, though, as above stated, it has not been customary in Georgia to so attest them.

Crop must Be Up and Growing Before It Can Be Mortgaged.

What is the advantage of waiting until May 1st to take a crop mortgage? Should such a mortgage be recorded?

A crop cannot be mortgaged until it is up and growing. It is not considered a crop until that time, and, therefore, is not the subject of mortgage, the law requiring that the property mortgaged shall be specifically described in the mortgage itself. *Redd v. Burrus*, 58 Ga. 574.

The reason for recording such a mortgage is to preserve its priority over other mortgages and liens. It is true that under § 3349, Park's Ann. Code, "The liens of mortgages on crops which mortgages are given to secure the payment of debts for money, supplies and other articles of necessity, including live stock, to aid in making and gathering such crops, shall be superior to judgments of older date than such mortgages." But these mortgages would rank as between themselves according to the record, unless the junior mortgagee had notice of the existence of the prior mortgage.

Mortgage of Peach Crop.

Can a valid lien be created in the latter part of January upon the year's peach crop? If so, what description should the mortgage contain?

While the courts of Georgia seem never to have passed upon the question as to whether a peach crop could be mortgaged as early as the time indicated, I think a valid mortgage on such a crop could be created. Park's Ann. Code, § 3256, says that a mortgage "may embrace all property in possession or to which

the mortgagor has the right of possession at the time," and under this section the Supreme Court has held that a crop planted and up and growing may be mortgaged. I quote from the decision in *Stephens v. Tucker*, 55 Ga. 543:

"A mortgage executed in May, 1873, of six bales of cotton, growing and being grown and produced on a plantation in Lee County, known as the Jesse Tucker plantation, and cultivated by the mortgagor, said bales to average five hundred pounds each, to be covered with bagging and bound with iron ties, and 'to be delivered in good order and condition at the warehouse of Welch, Bacon & Cook, in Albany, Georgia, on or before the 15th of October next,' is sufficiently specific in the description of the particular bales mortgaged.

"If it be proved to the satisfaction of the jury, that six bales of the crop of cotton so grown, ginned and packed, were delivered at said warehouse, the cotton will be sufficiently identified as that described in the mortgage, and will be subject to execution issued thereon."

Other decisions in which this has been held to be the law are: *Redd v. Burrus*, 58 Ga. 574; *Crine v. Tifts*, 65 Ga. 644; *Forsyth Manufacturing Co. v. Castlen*, 112 Ga. 199; *Hall v. State*, 2 Ga. App. 739. It appears from these decisions that a crop having any actual or potential existence can be mortgaged.

Applying these decisions to the case of a peach crop, I think the peaches could be mortgaged the latter part of January. I am informed by peach growers that at that time buds can be seen on the trees, and that they can tell with a reasonable degree of certainty what sort of crop they will have, provided the cold weather does not kill it. In view of this information, I should say that a peach crop at the time indicated certainly has a potential existence and that, therefore, a valid mortgage upon it can be created.

It is usual in mortgaging a crop to describe it as "So many acres of cotton or so many acres of corn," but I think under the decision in *Stephens v. Tucker*, above quoted, a mortgage could be taken on five hundred crates of peaches, the land on which the peaches are raised being fully described so it could be identified.

Advantages of Reciting Purpose for Which Crop Mortgage Is Given.

Where money is advanced on a crop mortgage, is it of advantage to state in the mortgage that advance is for purpose of raising the crop, and if so drawn, will mortgage be of equal dignity with landlord's lien for supplies advanced to make the crop?

It is best that a crop mortgage taken to secure advances of money or other things needed to make a crop should so state in the mortgage itself. This is not necessary, for if the money was in fact advanced for the purpose, it could be shown, but this requires proof. Such a recital in the mortgage would estop the mortgagor, or any one claiming through him, from questioning the fact that the amount was advanced for the purpose of making the crop.

The lien of a landlord for supplies furnished is superior to such crop mortgage. See Park's Ann. Code, § 3351.

CURRENCY.

Stamping Advertisement on, Criminal.

Is it contrary to law to use rubber stamp on currency imprinting on it in ink such notations as "This bank insures your deposits. Bank of A"?

Yes; the U. S. Criminal Code, § 177, Rev. St., § 5188, provides:

"It shall not be lawful * * * to design * * * any business or professional card * * * in the likeness or similitude of any bond, certificate of indebtedness, certificate of deposit, coupon, United States note, treasury note, gold certificate, silver certificate, fractional note or other obligation or security of the United States which has been or may be issued under or authorized by any Act of Congress heretofore passed, or which may hereafter be passed, or to write, print or otherwise impress upon any such instrument, obligation or security, any business or professional card, notice or advertisement, or any notice or advertisement of any matter or thing whatever."

The penalty for violating the section is a fine of not more than \$500.00.

DEPOSITS.

Payment of Deceased Depositor's Balance to His Heirs.

Can a bank safely pay over to the heirs at law of a deceased depositor the amount of his balance, as well as the amount due on time certificates, the heirs being all of age and the customer having left no debts?

Where the heirs are all of age and are laboring under no disabilities, they can divide among themselves an estate, provided there are no debts. The trouble about cashing the time certificates and paying out the deposits under such an arrangement as this is, that it throws upon the bank the necessity of determining whether there are any debts and whether the persons who make the division are all of the heirs at law, and whether they are all legally qualified to act. Where the parties are known and where the heirs are themselves responsible, there is very little risk. If the matter is to be handled in this way, each one of the heirs should be required to indorse the certificate of deposit as heirs at law of the decedent, and also to sign the check for the amount of the deposit. If they hold a savings bank pass book, this should be surrendered. They should also be required to sign a written obligation, reciting that they are all of the heirs at law of the deceased; that they are all of age and otherwise *sui juris*; that the deceased left no will, and there has been no administration on his estate; that he left no debts or that all of his debts have been satisfied in full; and that the heirs are dividing among themselves his estate; and obligating themselves to protect and save the bank harmless on account of the paying over to them of the deposit and the cashing of the certificate.

This method is frequently adopted where the amount on deposit is small, but it should be an invariable practice where the amount is considerable to require the taking out of letters of administration and the filing with the bank of a certified copy; then have the money paid over to the administrator. Payment to an administrator is a perfect protection to a bank, and it is the only really safe way in which the account of a deceased person can be closed. Temporary letters can be had on application and without any delay, and the cost is inconsiderable. Usually bond can be arranged among the heirs themselves. I think it always much better to require the qualification of a temporary administrator, at least, rather than to undertake to pay out any considerable sum of money on the voluntary agreement of the heirs.

NOTE.—The Banking Act of 1919, § 192, makes special provision for the payment of deposits of less than \$100.00 when the entire estate does not exceed \$500.00 and no administration is had upon the estate.

Gift of Deposit to Take Effect at Death of Donor Can Only Be Made by Will.

Can one, without making a will, have the title to money deposited by him pass to another at his death?

A testamentary gift to take effect upon the death of the giver can only be accomplished by will. A deposit, the depositor retaining control during his life, could not pass at his death to any particular designated person unless provided for by will.

NOTE.—The Banking Act of 1919, § 183, provides that deposits made in the name of two persons, payable to either, may be paid to the survivor in case of death of the other.

On Insolvency of Bank Depositors Share Equally with Other Creditors in Distribution of Its Assets.

Do all creditors of a bank share equally in its assets, or do the depositors have a preferred claim on the general assets, or does the preference given to depositors apply only to the double liability of the stockholders?

Depositors rank equally with other creditors so far as the capital, property and assets of a bank are concerned. They have no superior right to other creditors save as to the stockholders' liability. The individual liability of the stockholders under our statute is to depositors only. This was true under the old law, and is also true under the Banking Act of 1919, § 137.

Status of Depositor Not Changed by Payment of Interest on Deposit.

Does a depositor who is paid interest on daily balances rank the same as a depositor not drawing interest?

Payment of interest does not change the character of a deposit. Interest-bearing deposits and those that do not bear interest are on the same footing.

The Banking Act of 1919, § 2, provides that the term "depositor" includes "any person who shall deposit money * * * whether interest is allowed thereon or not."

Deposit for Special Purpose May Be Checked Out by Depositor for Other Purposes.

A depositor writes on one of his deposit slips "to cover draft of John Doe also." The deposit is larger than the amount of the draft. This deposit is entered on the customer's regular account. The bank knows of this particular draft. Would the bank be justified in declining to pay checks presented in the regular course of business which would reduce the depositor's balance to an amount less than the face of the draft? If the bank should allow the balance checked out, would it be liable to the drawer of the draft for not having reserved a sufficient fund to cover the draft?

A deposit may be made for a special purpose, and the bank would be expected under these circumstances to hold the deposit for that particular purpose. In the case mentioned, so much of the deposit as was necessary to pay the particular draft specified could properly be held by the bank to cover the draft; but while this is true, the bank would be under no contractual relation with the drawer of the draft, and he would have no right to complain if the amount was checked out. Of course, the bank might make itself liable to pay the draft by accepting it or by being a party to the contract by which the deposit was made for the purpose of covering the draft, but where the bank had assumed no direct obligation to the drawer of the draft, he would have no right of action because the bank had allowed the deposit checked out by the depositor. To illustrate, suppose a deposit is made for a particular purpose, and thereafter the depositor changes his mind about it, and comes to the bank and draws out the deposit. There would seem to be no reason why he could not do this, the bank having assumed no obligation to any one except the depositor himself. The bank would be justified in declining to pay checks of the customer unless these checks clearly indicated the purpose on the part of the customer to withdraw the special deposit, but the payment of such checks would not make the bank liable to any one except the depositor, and, of course, he could not complain of the payment of his own checks.

Father Has No Right to Check Out Money Deposited in Name of Minor Son.

Where a father deposits money in a bank to the credit of his minor son, can the bank pay out the money on the father's check?

It has been held that a bank cannot pay out such deposit on the father's check. In the case of *Dickinson v. Leominster Savings Bank*, decided by the Supreme Judicial Court of Massachu-

setts, 152 Mass. 51, 25 N. E. 12, which was a suit by a minor against a bank for money deposited in her name and paid out to her father, the court said: "The bank had no right to make the payments to the father, if the deposits were absolutely the property of the plaintiff, even if the father had made the deposits."

It is true, however, that a deposit of money in the name of a person does not conclusively show title in the person in whose name the deposit is made. If the bank should pay out this money on the father's checks, it might be permitted to show that the money was deposited by the father in the name of the son merely for convenience, and was not intended as a gift to the son, and that nothing had in fact been done by the son or on his behalf in the way of accepting the gift. If these things could be proved, the bank might be protected in a suit brought by the son or on his behalf.

In my opinion, however, the bank would take a very grave risk, for it would certainly carry the burden of overcoming the *prima facie* case made for the minor by the fact that the deposit stands in his name.

The bank might pay out the money on the father's check upon his giving a bond with good security conditioned to hold the bank harmless against any claim which might thereafter be made by the son or on his behalf. And of course the bank could pay out the money on the check of a lawfully appointed guardian for the son.

Note.—The Banking Act of 1919, § 185, provides: "A minor shall be allowed to deposit money in bank in his own name, and the money so deposited shall not be subject to the control of his parent, guardian or trustees, but may be drawn or checked out by the minor depositing the same as though he were of full age."

Deposit in Two Names Presumed to Belong Equally to the Two, but Since Banking Act of 1919 May Be Paid to the Survivor.

What is the status of deposits made in the name of two persons, where one of them dies and the bank was not advised as to the ownership of the fund?

Where a deposit is made in the name of two persons, in the absence of some information as to the real ownership, the law would presume that the fund was owned in equal parts by the

depositors; and on the death of one, his administrator would be entitled to his share in the fund, and the other would have no right to check out the balance. This would be true whether the deposit was subject to the joint check of the parties or to the check of either of them.

It has been held, however, that it is competent for parties making a deposit to agree with each other and with the bank that the fund deposited shall be subject to the check of either of the depositors and to the check of the survivor on the death of either of them, the contract being construed as amounting to a gift *inter vivos*. In the absence of a distinct agreement, however, upon the death of one of the joint depositors his interest in the fund would go, not to the survivor, but to his administrator.

Since this was written the Banking Act of 1919 has been adopted. Section 183 of this act provides that deposits made in the name of two persons, payable to either, may be paid to either whether the other be living or not. This is now the law in most of the States.

DIRECTORS.

To Qualify as Such, Director Must Hold Stock in His Own Right.

Can one holding stock in a bank as executor or administrator be elected a director of the bank?

Directors of a bank, under the laws of Georgia, must be owners in their own right of the requisite amount of qualifying stock. The holding of stock as executor or in any other representative capacity would not constitute one a stockholder within the meaning of the statute, and, therefore, one so holding stock could not be made a director. See § 146, Banking Act of 1919.

Amount of Stock Necessary to Qualify as Director in National Bank.

A director in a national bank sells his stock to a corporation in which he owns half the stock, under an agreement between himself and the corporation, that eight shares of the bank stock are to remain in his name in order that he may continue to act as a director of the bank. Can he legally act as a director of the bank after such sale?

Under the circumstances stated, the director is not qualified since the sale of his stock to act as a director. The provision

of the National Bank Act, § 5146 of the Revised Statutes, is that:

"Every director must own in his own right at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place."

The next section of the Revised Statutes, which prescribes the oath to be taken by directors, requires that a director must swear "that he is the owner in good faith and in his own right of the number of shares of stock required by this title subscribed by him or standing in his name on the books of the Association."

It appears that the director in this case does not hold the required number of shares of stock, even if the arrangement were otherwise legal. I do not think, however, that he would be qualified to act as a director under the circumstances stated even if there were ten shares of stock standing in his name in order to qualify him as such director. He has in reality under that arrangement ceased to be the owner of ten shares of stock, and is not the owner in good faith and in his own right of the required number of shares. He is therefore required, under the provisions of the National Bank Act referred to, to vacate his place as director.

Approval of Loans by Directors.

At a directors' meeting loans made since the last meeting are reported, the notes examined, and the loans approved and ordered to be entered on the minutes as approved. Is such a form of approval or acceptance binding on the directors, and would the cashier be relieved of responsibility for having made these loans?

I do not see how there could be any question about the matter. The directors can confer upon the cashier the power to make loans, and loans so made in good faith would not require any further approval in order to bind the directors and relieve the cashier of liability. Where the directors adopt the policy, either under a by-law or by custom, of actually, at each meeting, going over the loans and formally by resolution approving them, this approval would certainly be binding, and would relieve the cashier of any further liability for having taken these particular notes, assuming always that the cashier acted in good faith. It should be remembered that loans to officers, directors and employees must be authorized in advance by the board of directors or by a committee of the board authorized to act. Banking Act of 1919, §§ 155, 156.

Directors May Delegate to Committee Authority to Make Loans and Transact Ordinary Business of the Bank.

How far can the board of directors of a national bank empower the executive committee to act? If the board has no right to delegate authority, can authority be delegated to a committee by an amendment to the by-laws?

The board of directors are the chosen representatives of a bank. As such, they constitute the corporation to all intents and purposes. What they do within the scope and object of the corporation is the act of the corporation itself. They can not abrogate their authority nor delegate the authority which has been delegated to themselves by the charter and by-laws. They have the right to appoint committees, agents and officers, and confer upon them executive authority, so long as they do not abrogate their own power or relieve themselves of responsibility. If it is intended that authority should be permanently exercised, either by a committee or by the officers of a bank, the by-laws should so provide. It is not unusual. In fact, in many institutions executive or finance committees are provided for by the by-laws, which committees exercise in large measure the powers of the bank, making loans, discounting paper, borrowing money, and generally transacting almost all of the business of the bank. Such committees report their action to the board, and the board by adopting the report of the committee adopts its acts, and makes them the acts of the board itself. When done in this way, there can be no objection to the appointment of an executive or finance committee, and as a small committee can much more readily be gotten together, and can act much more quickly, and frequently more intelligently than a large board, the desirability of appointing such a committee is manifest.

A Director Who Is an Indorser of the Bank's Paper Is Not Relieved of His Liability upon His Resignation and the Sale of His Stock.

Is a director of a bank who has indorsed the bank's paper released from his indorsement when he sells his stock and thereby ceases to be a director?

The sale of the stock would in no way affect the liability already assumed. It can readily be seen that if it were otherwise all the directors could resign and the bank lending the money would in that event have no security whatever for its advances

other than the liability of the bank itself. Unless the holder of the paper consented, the director would remain liable regardless of the sale of the stock.

DISCOUNTS.

At Seven Per Cent. or More, the Amount Reserved Not Exceeding Eight Per cent., Not Usurious Though Not in Writing.

Is discount by a bank at seven per cent. illegal unless a higher rate is agreed on in writing?

Park's Ann. Code, § 3426, provides that: "The legal rate of interest shall be seven per cent. where the rate per cent. is not named in the contract, and that any higher rate must be specified in writing, but in no event to exceed eight per cent. per annum."

Under the decisions of the Supreme Court, however, where a bank discounts paper at seven per cent., this section of the Code is not violated, provided the discount charged does not exceed eight per cent. I quote from two decisions on the question.

In *Tribble v. Anderson*, 63 Ga. 56, it was said:

"It was, however, insisted, as matter of law, that when the statute allowed a conventional rate of interest higher than the general rate, on condition that the contract therefor was in writing, the rate stipulated for or agreed on had to be expressed in the writing, and that to add the principal and interest together, giving a note for the aggregate, would not be a compliance with the statute. We think otherwise. The statute merely intended to distinguish between written and parol contracts, declaring the former effectual and the latter not. The promise to pay might be so much in a round sum, provided the statutory limit as to rate was not exceeded, and if the promise and the sum were evidenced by writing the contract would be in writing."

Following this in the case of *Green v. Equitable Mortgage Company*, 107 Ga. 536, the Supreme Court, construing the Code provision on this subject, said:

"The statutory provision, that 'Any higher rate [than seven per cent.] must be specified in writing, but in no event to exceed eight per cent. per annum,' is, in a given instance, substantially complied with, if in fact the lender does not contract to receive more than eight per cent. per annum for the use of the principal advanced. The contract in this case was not usurious."

Officer or Director Cannot Discount Paper Payable to Himself.

What is the law with reference to an officer and director of a bank discounting with the bank notes payable to himself, where the amount of such discount does not exceed ten per cent. of the capital and surplus, the officer and director being a member of the finance committee, which passes on the paper?

An officer of a bank has no right to lend to himself, although he may have the general authority to make loans. He cannot represent the bank and deal with himself. The same rule would apply to the discount of paper as to making direct loans. A bank can discount papers payable to an officer or director, provided it is not by so doing violating the section of the Code prohibiting the lending to an officer without good collateral or other ample security. In other words, if the paper itself is good, there would be no reason why the bank could not buy it, but it should not buy it on the strength of the officer's name alone. Where a loan is being made to a member of the finance committee, such member must not act in passing on the loan, and the loan must be approved by the written signature of the majority of the directors or of the committee authorized to act. Sections 155 and 156 of the Banking Act of 1919 fully cover the question.

DIVIDENDS.

Directors, Not Stockholders, Declare Dividends.

Who has the authority to declare dividends from the profits of a bank, the directors or the stockholders?

I quote from Cook on Corporations, p. 1471:

"The board of directors declare the dividends, and it is for the directors, and not the stockholders, to determine whether or not a dividend shall be declared."

The authority is expressly conferred on the directors by § 173 of the Banking Act of 1919.

To Whom Payable Upon Transfer of Stock Between Date of Declaration and Date of Payment.

Who is entitled to dividends on stock transferred after the dividends are declared but before they are payable?

I quote from Machen on the Modern Law of Corporations, §§ 1370 and 1375:

"The person who is the registered holder at the time the dividend is declared is the person in whom, so far as the company is concerned, the right to the dividend vests. This is true even where the dividend is made payable at some later date. * * * As between transferor and transferee of shares, the right to dividends is of course a mere matter of mutual agreement. The legal presumption is that the parties to a contract of sale of shares intend that all dividends and *bonuses* declared after the making of the contract, whenever the profits out of which they are declared may have been earned, shall belong to the transferee and that all dividends and *bonuses* declared prior to that time, even though not payable until afterwards, shall go to the transferor."

I think this completely answers the question.

Pledgee Entitled to Dividends on Stock Held as Collateral.

Where stock is pledged as collateral, is the holder entitled to collect the dividends? If the corporation is in liquidation is the pledgee entitled to the liquidation dividends?

This question is answered in the case of *Guarantee Company of North America v. East Rome Town Company*, 96 Ga. 511, as follows:

"Where stock of an incorporated company is pledged by the owner as collateral security for the payment of a debt, the pledgee is, as a general rule, entitled to collect and receive the dividends thereon, unless this right is reserved by the pledgor at the time the pledge is made."

The pledgee or collateral holder should give notice to the corporation, and is thereafter entitled to demand and receive the dividends declared on the stock.

It is equally true that where a corporation is in liquidation, the liquidation dividends should be paid to the person holding stock in the corporation as collateral security, and not to the pledgor.

Dividends Can Only Be Paid to Stockholder or His Legal Representative, Although He May Have Disappeared and His Whereabouts Been Unknown for Long Period.

Where a stockholder of a bank has disappeared, and his family know nothing of his whereabouts, and nobody knows where his stock certificate is, can the bank turn over to his father dividend checks which have accumulated during the stockholder's absence?

The bank can not pay over dividends to the father of the stockholder except at its own risk. If the stockholder has been absent and unheard of for more than seven years, the law would presume that he is dead, and his estate could be administered and the stock sold as a part thereof. But if he has not been absent for that long a period, the presumption is that he is still in life and will sooner or later claim his stock and the dividends thereon. In the event he should do so, the payment to the father would not be any protection. It is possible, also, that he may have transferred his stock to some one else, in which event, while payment to the stockholder of record would be a protection, payment to the father, who is not a stockholder, would not be.

If the stockholder has been absent for a long period and there is not, as a matter of fact, much probability of his ever returning, the bank might take the risk of paying the dividends to the father, taking from him a bond, or, if his solvency is sufficient to justify it, his personal obligation, to reimburse the amount paid, with interest and any expenses or costs which might accrue on account of the payment. Whether this would be wise would depend entirely on the circumstances of the case.

DRAFTS.

Liability of Drawer After Acceptance Is Secondary, Acceptor Being Primarily Liable.

What is the liability of the drawer of a draft after acceptance?

I quote in substance from *Parmelee v. Williams*, 72 Ga. 42:

"Where a negotiable draft was drawn and accepted by the drawees, after negotiation the acceptors were primarily and absolutely bound therefor to the holder. The drawer was bound to pay if the acceptors did not. As to the holder, the acceptors may be regarded as makers and the drawer as first indorser."

This is the well recognized rule.

After Collecting Draft and Delivering Order Notify Bill of Lading, Bank Cannot Hold Amount Paid by Request of Drawee as Money Belongs to Owner of Draft.

Drawee of draft with bill of lading order notify a third party attached pays draft to bank holding it for collection and bill of lading is delivered to him. Subsequently the third party refuses shipment on ground goods are not as ordered. Drawee notifies collecting bank not to remit for draft, but refuses to return bill of lading unless reimbursed for his loss in the transaction. Forwarding bank demands remittance or return of bill of lading. What course shall collecting bank pursue?

The purpose of shipping goods to the order of the shipper and attaching bill of lading to the draft on the purchaser is to retain title in the shipper until the goods are paid for. In the case stated, as soon as the drawee paid the draft and took up the bill of lading, title to the property passed from the shipper to him, and, of course, the shipper was entitled to the proceeds of the draft, that is, the purchase price of the property covered by the draft. The collecting bank would have had no authority to deliver the bill of lading except upon the payment of the draft. Having received payment it holds the amount for the shipper or the bank from which it received the draft, and would not be authorized to hold the amount or return it to the drawee unless it could return the bill of lading, placing the shipper in the same position that he would have occupied had delivery not been made. The drawee cannot retain the bill of lading which gives him title to the goods and refuse to pay for them, or, what is equivalent to the same thing, insist on the bank holding the money.

Of course, in the case stated, the situation is somewhat complicated, by reason of the fact that the goods were rejected, not by the original purchaser who paid the draft, but by his customer; at the same time as between him and the shipper the situation is the same as though he had rejected the goods. Having accepted them by the payment of the draft, the collecting bank will have to remit to the correspondent from whom the draft was received, unless prevented from doing so by garnishment or some other appropriate legal proceeding.

Bank Which on Authority of Forged Telegram Wires Another Bank to Honor Draft Must Protect the Second Bank in So Doing.

If A signs B's name to a telegram which instructs a bank to wire another bank to pay a certain sum to A and the former bank wires the latter to honor A's draft on B and it does so, can the latter bank recover the amount from the former when the fraud develops?

The first bank would be liable for the amount paid in pursuance of its telegram. The second bank received a genuine telegram from the first bank directing the payment to a named party, upon his draft on another party named. After getting this telegram, and without any reason to suspect that a fraud was being perpetrated on either bank, or on the drawee of the draft, the second bank honored the same. The second bank was innocent in acting on the telegram, and the other bank, as between the two, ought clearly to be the loser.

EXCHANGE.**Rate Not Fixed in Georgia.**

What is the legal limit, if any, to the amount of exchange to be charged by one bank in remitting to another bank for checks drawn on the bank remitting?

The rate of exchange is not fixed in Georgia. Not only is there no fixed legal rate, but I do not think there is any such customary rate as would be enforceable as a matter of custom. Of course, as between particular banks, where a rate has for a considerable time been in force, whether by agreement or by custom, no change in this rate should be made without due notice; and where the banks in a particular locality have for a considerable period maintained a regular fixed rate and other banks generally had become accustomed to such rate, in the absence of notice that a change will be made, the forwarding banks would have a right to assume that the old rate would remain in force. But there is no reason why a bank can not change the rate at any time it sees fit. All that would be necessary would be to notify the banks with which it does business that a new rate would be enforced from that time forward. [But see § 171 as amended by Act of 1920.]

Checks in Payment of Taxes Due the United States Must Be Remitted at Par.

Are checks in payment of Government obligations required to be remitted at par?

The Revenue Act of October, 1917, provides that under Rules and Regulations prescribed by the Secretary of the Treasury, collectors of internal revenue may receive, at par and accrued interest, checks in payment of income and excess profits taxes, during such time and under such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe.

In Treasury Decision 666, issued to collectors of internal revenue by the Commissioner and approved by the Secretary of the Treasury on March 8, 1918, the following ruling is made:

"Collectors should give the widest possible publicity, through newspapers and all other available means, to the fact that all checks in payment of income and excess profits taxes must be collectible at par (without any deduction). Taxpayers who are not sure that their checks will be paid at par should be advised to write beneath the amount 'without deduction for exchange,' or 'with exchange.'

"The collector need not, however, examine all checks to see whether or not they are collectible at par, but should stamp on the face of each the words 'This check is in payment of an obligation to the United States and must be paid at par. No protest,' with his name and title. If the bank on which a check is drawn should refuse to pay it at par, it will be returnable through the depository bank and should be treated in the same manner as a bad check."

Under the law, therefore, as construed by the Treasury Department, it would seem that a bank is required to remit at par for such items, if it handles them at all. I do not think the law requires a bank to handle such checks if it does not wish to do so. But if it does handle them, it must remit at par.

Checks May Be Made Payable in Exchange Only.

Is it legal to stamp on checks the phrase, "payable in New York or Savannah Exchange," the purpose of making such an entry being to prevent demanding payment of the check in cash through the post office or through an express company?

A check is an order given by the depositor to the bank directing payment of a portion or all of his deposit to a particular

person or to bearer. The bank is compelled to carry out the direction of the depositor and pay in whatever manner the depositor directs. To illustrate: The depositor may direct payment to the order of a named person or simply to the bearer of the check; and it has been held in Georgia that a depositor may direct payment through a particular bank, and that this direction must be complied with. *Farmers Bank v. Johnson, King & Co.*, 134 Ga. 486.

In discussing this case, the Supreme Court says that the drawer of a check has a right to direct the channel through which it shall be presented for payment, and the payee of the check is bound to respect this direction. He can refuse to take the check on account of such direction, but if he takes it he must present it through the channels directed. During the panic of 1907, it was quite frequent for checks to be stamped payable only through a particular clearing house, and such directions were uniformly respected. Morse, one of the leading writers on the law of banks and banking, says:

"Valid agreements may at any time be entered into between the bank and the customer concerning the species of money or currency in which his checks may or shall be honored. The holders of the checks need be no parties to this agreement. They have accepted from their debtor his check as a means of procuring money, but the bank is not therefore liable to pay them money. The nature of the duty of the bank to them is determined by the nature of its duty to the depositor. It is bound to offer to them whatever it has undertaken with him that it will offer to holders of his checks. If this be unsatisfactory to the holders, their sole recourse and remedy is against him." Morse on Banks and Banking, § 447.

It seems, therefore, that it is quite competent for a bank to agree with its customer that his checks will be honored in exchange, or to make any other reasonable agreement as to the handling of his account; and where such agreement is made, anyone accepting a check upon which such an agreement or provision is entered takes it subject to this agreement, and cannot compel payment in any other manner than that specified.

FIXTURES.

Sold Under Retention Title Contract, How Far Rights of Vendor Protected.

Lighting plants are sold and erected in farm houses, a gasoline engine being placed on a foundation to which it is securely attached, and the houses being wired for electric lights. The seller retains title to the plant. Does the plant become such a fixture by reason of its being attached to the ground and the house that the seller loses his right to recapture his property in the event his debt is not paid?

Under the Code:

"Anything intended to remain permanently in its place, although not actually attached to the land, such as a rail fence, is a part of the realty, and passes with it. Machinery, not actually attached, but movable at pleasure, is not a part of the realty." Park's Ann. Code, § 3621.

This provision, however, does not always provide a certain and easy test by which to determine, in a given case, whether or not the article in question remains personality, or is attached to the realty and a part thereof. The intention of the parties frequently determines. An article, which would ordinarily be regarded as personality, may be held to be a fixture; and, conversely, a fixture may, where the parties so intend, remain personality. The circumstances under which the article is attached, and the use to which the property is put frequently determines its character. A lighting system attached to the building would ordinarily be classified as a fixture and would pass with the property on a sale thereof; but where it is sold under a contract retaining title, the intention of the parties that the property should retain its character as personality although attached to the realty would govern, and the seller of the lighting system would not lose his title although the property should be attached to the building. This applies, however, only as between the original parties to the contract. A subsequent purchaser of the land, or a subsequent mortgagee thereof, without notice of the retention title contract, would acquire rights superior to the contract. This has been distinctly held by the Supreme Court:

"When land is conveyed, whatever fixtures are annexed to the realty at the time of the conveyance pass with the estate to the vendee unless there be some express provision to the contrary; and fixtures pass to a *bona fide* purchaser of the real estate, notwithstanding an agreement between the owner of the land and the vendor of the fixtures that they should remain personal prop-

erty. The same rules as to fixtures which apply as between vendor and vendee apply also as between mortgagor and mortgagee. And a mortgage on the land in the absence of any agreement to the contrary includes not only such fixtures as are attached to the realty at the time of its execution, but such as may be annexed subsequently." *Cunningham v. Cureton*, 96 Ga. 489.

Whether or not the record of the conditional sale contract, or the note retaining title, would be such notice as to prevent a subsequent purchaser, or mortgagee, of the land from being a *bona fide* holder, has not been decided in Georgia. The weight of authority outside the State seems to be that record would be notice, but there is very respectable authority to the contrary. In a recent case the Georgia Court of Appeals said that it is inclined to believe that notice by the record of a conditional sale contract would be sufficient to prevent the purchaser of the land from acquiring the title to the fixtures, but as it was not necessary to decide the question in order to dispose of the case, the court expressly declined to pass on it. *Empire Cotton Oil Co. v. Continental Gin Co.*, 21 Ga. App. 16. The question is, therefore, an open one in Georgia.

It will be seen that neither the seller of the lighting plants, nor the holder of retention title contracts, are protected under all circumstances. While the retention title contract is good as between the seller of the plant and the purchaser, and is probably good as against a subsequent vendee, or mortgagee, of the land, it is not good as against such vendee, or mortgagee, unless he has notice of the outstanding contract; and, whether the record of the contract constitutes such notice has not been decided in this State.

GARNISHMENTS.

**In Superior Courts Answer May Be Filed at Second Term,
but in Justice Courts Must Be Filed at First Term.**

Does answer have to be filed to a summons of garnishment on the date mentioned in the summons, that is, on the first day of the first term, or does the garnishee have until the second term in which to make answer, and can judgment be taken at the first term in the event answer is not made at that term?

In the Superior Courts the rule is as follows:

"When any person summoned as garnishee fails to appear in obedience to the summons, and answer at the first term of the

court at which he is required to appear, the case shall stand continued until the next term of the court; and if he should fail to appear and answer by said next term, the plaintiff may, on motion, have judgment against him for the amount of the judgment he may have obtained against the defendant in attachment, or so much thereof as shall remain unpaid at the time the judgment is rendered against the garnishee; and the court may continue the case until final judgment is rendered against the defendant in attachment." Park's Ann. Code, § 5097.

While this section applies primarily to cases in attachment, the same rule applies to garnishments in common law cases, that is, on pending suits or judgments. As said by the Supreme Court:

"In the Superior Court the garnishee in all cases has until the first day of the second term after the service of the summons of garnishment in which to answer." *Averback v. Spivey*, 122 Ga. 18.

No judgment by default can be entered against the garnishee until the second term, and no judgment can be rendered against the garnishee until after judgment is obtained against the defendant.

In justice courts, however, answer must be filed at the first term. I quote the section of the Code applicable:

"When a process of garnishment is issued out, returnable to any justice's court and served upon the garnishee, it shall be the duty of the garnishee to answer at the term to which the garnishment is made returnable. And in case of failure so to answer, the justice of the peace shall enter a default against the garnishee, and shall enter up judgment in favor of the plaintiff against the garnishee, for such an amount as may have been obtained by judgment against the defendant, or for such amount as may thereafter be recovered in the pending suit." Park's Ann. Code, § 4753.

The practice in the city courts generally conforms to that in the superior courts, but as these courts are created by special act, the act must in all cases be looked to to determine what the practice in the particular court may be. This is also true with reference to the municipal courts recently created in some of the larger cities.

Answer Must Include All Property Coming Into Hands of and all Debts Due by Garnishee Up to Date of Answer.

When a garnishee files answer to summons of garnishment at the second term, should the answer include the amount due the debtor at the time of the answer or the amount due at the date the garnishment is returnable?

The garnishee is required to answer what property, money or effects of the defendant he had in his hands at the date of the service of the summons, and also what property, money or effects have come into his hands at any time from the date of the service to the date of the answer, and what amount he is indebted to the defendant at the date of the service, and what additional amount he may have become indebted between the date of the service and the answer thereto. Park's Ann. Code, § 5271.

Under this section the answer should include all funds or property coming into the hands of the garnishee and all indebtedness up to the date of the answer.

National Banks Are Subject to Garnishment.

Is a depositor's account with a national bank subject to garnishment?

It is. The Judicial Code of the United States, § 24 (16) provides that except in suits commenced by the United States or its officers and cases for winding up their affairs, "national banking associations shall, for the purposes of all other actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located."

While § 5244 of the U. S. Rev. Stat. provides that "no attachment, injunction or execution shall be issued against such [national banking] association or its property before final judgment in any suit, action or proceeding in any state, county or municipal court"; the Supreme Court of the United States holds that it does not prohibit the suing out of a garnishment against the bank as garnishee, as this is not an attachment against the bank or its property nor a suit against it within the meaning of this section. *Earle v. Pennsylvania*, 178 U. S. 449, 44 L. Ed. 1146.

Deposit to Credit of "A, Agent," May Be Subjected on Garnishment Against A.

A deposit is made by A, Agent." The bank is served with garnishment against "A" individually, but is notified at the time that it is contended the deposit is really the money of "A" and not of his wife for whom he claims to be acting as agent. Must the bank hold the deposit subject to the garnishment or can it pay the money over on check signed by "A, Agent"?

In the case of *Pettey v. Dunlap Hardware Company*, 99 Ga. 300, the Supreme Court held that where money was deposited to the credit of a named person, as agent, it could be reached by garnishment served upon the bank at the instance of the creditor of the depositor, and if the bank knew the creditor's contention was that this money in fact belonged to the depositor, individually, and not to another for whom he claimed to act as agent in making the deposit, it could not, except at its peril, pay over the money to the alleged principal.

Under this ruling it would be the duty of the bank to hold the deposit subject to the garnishment. If the money in fact belonged to another person for whom the depositor was acting as agent, that person could claim the fund in the garnishment proceeding, and by giving a bond dissolve the garnishment and check out the deposit. The bank should require this before paying over the money to the alleged principal.

Negotiable Instruments Are Subject to Garnishment.

Where a bank has issued a cashier's check or certificate of deposit and afterward is served with a summons of garnishment at the instance of a creditor of the customer, can it safely pay over the money to a third person to whom the check or certificate has been indorsed?

Negotiable instruments are subject to garnishment and where the maker of such an instrument is served with garnishment based on a suit against the payee, he pays the instrument at his peril.

Therefore, a bank would not be safe in paying such a certificate of deposit or cashier's check, although it had been indorsed to a third person. The proper course for the bank would be to answer the garnishment, setting up the fact that the certificate or check had been given and that the amount was due but that the bank could not say whether it was due to the original payee or to some other person. Unless this was done the burden would be upon the bank to show that the check or certificate had been transferred before the garnishment was issued, and that the party presenting the same was a *bona fide* holder.

Deposit Is Subject to Garnishment Even After Check Drawn Against Same Is Held by the Bank, but Not Charged to Depositor's Account.

Is a savings bank account subject to garnishment, where check on this account has been turned over to a bank as security for a loan?

The giving of a check would not prevent the account from being subjected under process of garnishment. A check is not an assignment of the fund, and is revocable until actually paid. Quoting from the Supreme Court:

"An unaccepted check, drawn in the ordinary form, not describing any particular fund or using words of transfer of the whole or any part of any amount standing to the credit of the drawer, does not amount to an assignment at law or in equity of the money to the credit of the drawer." *Reviere v. Chambliss*, 120 Ga. 714.

The fact that the bank holds the check would not prevent the drawer of the check from giving another check, which if presented for payment before the one held by the bank would be entitled to be cashed in preference to it. As the title to the fund does not pass by the giving of a check, it would still be subject to garnishment.

Cashier's Check Issued to Depositor in Exchange for Check of Another Subsequent to Service of Garnishment Is Subject.

A garnishment is served on a bank in a suit against a depositor. The depositor presents a check payable to his order drawn by a third person and asks the bank to exchange the check for a cashier's check. If the cashier's check is issued, does the amount which it represents become subject to garnishment?

In my opinion the amount of the cashier's check is subject. A garnishment calls on the garnishee to answer what property, money, or effects of the defendant he has in his hands at the time the garnishment is served, what property, money, or effects have come into his hands at any time between the date of the service and the date of filing his answer, what amount he owes the defendant at the date of the service, and what amount he has become indebted to the defendant at any time between the date of the service and the date of the answer. When a bank issues a cashier's check in lieu of another check, it becomes indebted to the holder of the check for the amount thereof, and, therefore, would have to answer that it owed the defendant this amount.

Indeed, it is by no means certain that a bank can safely pay a check to a person where garnishment has been served on the bank calling on it to answer what amount it owes the payee. It has been held by the Court of Appeals (Watt-Harley-Holmes Hdw. Co. *v.* Day, 1 App. 646) that after the delivery of a check the drawer of the check can not be garnished as debtor of the payee in respect to the debt for which the check is given. This would seem to imply that the bank, so far as the garnishment is concerned, would be treated as the debtor of the payee and as having funds in its possession belonging to the payee. If this is true, it could not pay the amount to the payee after being served with garnishment. In the absence of a ruling from one of our appellate courts, the only safe thing for a bank to do where garnishment has been served on it against a particular party is to decline to pay that party anything either on his own check or on the check of another, and certainly it could not make itself the primary obligor, as by issuing a cashier's check or by certifying a check in his favor, without rendering itself liable under the garnishment.

Contents of Safety Deposit Box May Be Reached by Garnishment.

Where a garnishment is served upon a bank, can it safely allow a customer, defendant in the garnishment proceeding, access to a safety deposit box, which the bank has rented to such customer, the contents of the box being unknown to the bank, and is the bank required in response to the garnishment to answer that it has property, money or effects of the defendant in its custody or control?

The precise question does not seem to have been decided in Georgia. It has been held, however, that where a defendant left with a garnishee a large box, securely nailed, for safe keeping, the garnishee declining to be responsible for it and not knowing its contents, the garnishee was liable where he permitted the defendant to go into the box and remove its contents. *Loyless v. Hodges*, 44 Ga. 647.

There appear to be only a few reported cases in which the precise question as to whether the contents of a safety deposit box may be reached by garnishment has been decided. Probably the leading case is *Tillinghast v. Johnson*, 82 Atl. 788, 41 L. R. A. (N. S.) 764, decided by the Supreme Court of Rhode Island. I quote the headnote:

"A safe deposit box, kept in the vault of a safe deposit company subject to its general control, access to which can be obtained only under restrictions imposed by it, is in its possession, although the box has been rented to a customer, and can be opened only by the joint use of a master key in the possession of the company and a key in the possession of the customer, and hence is subject to attachment by garnishee process against the company in an action against the customer."

To the same effect is *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 125, 54 L. R. A. 204; *Washington, etc., Co. v. Susquehanna Coal Co.*, 26 App. D. C. 149, and *National Safe Deposit Co. v. Stead*, 250 Ill. 584, 95 N. E. 973.

The editor of the Lawyers' Reports Annotated, New Series, in a note to the *Tillinghast* case above cited, says:

"As to the garnishment of the contents of securely closed receptacles, while there are cases to the contrary under some statutes, the weight of authority is in accord with *Tillinghast v. Johnson*, to the effect that such property is subject to garnishment."

It has been generally held that a sealed package or a locked trunk in the possession of a bailee, although the bailee may not know its contents and may have no access to it, is subject to garnishment. I am, therefore, of the opinion that a bank renting a safety deposit box would be required in obedience to a summons of garnishment, calling on it to answer what property, money or effects of a customer renting a box it had in its possession, would be required to answer the fact that it had rented the box to the customer, but did not know the contents thereof; and that it could not safely permit the customer to withdraw any of the articles deposited so long as the garnishment is pending.

How Garnishment Should Be Answered Where Bank Has More Than One Account in Same or Similar Names as That of Defendant in Garnishment.

A bank is served with a summons of garnishment against Earl S. The bank has accounts with E. D. S., E. M. S., and E. R. S., one of whom is supposed to be Earl S., the party named in the garnishment. How should the garnishment be answered?

If the bank actually knows that one of these parties is named Earl S., it should answer indebted. If it does not, it should answer not indebted, and set up the fact that it has these three accounts.

As a matter of expediency, it would be wise to ascertain, if possible, from the three depositors which one is Earl S., or from the garnishing creditor which one of the accounts he is attempting to reach, and hold up that account only.

HOLIDAYS.

Banks Are Not Prohibited from Carrying on Ordinary Business on Legal Holidays.

Can a bank safely carry on its general business on a legal holiday?

There is nothing in the law which prohibits a bank from carrying on its business on a legal holiday if it desires to do so. There are certain things which the law forbids to be done on a legal holiday, but the prohibition extends only to the things named in the statute. The statute enumerates the public holidays recognized in this State, and declares that these days "shall for all purposes whatsoever as regards the presenting for payment or acceptance and the protesting and giving notice of the dishonor of bills of exchange, bank checks and promissory notes be treated and considered as the first day of the week, commonly called Sunday, and as public holidays; and all such bills, checks and notes otherwise presentable for acceptance or payment on said days shall be deemed to be presentable for acceptance or payment on the next business day thereafter." Park's Ann. Code, § 4284.

This is the only restriction upon carrying on business on a public holiday.

The Supreme Court and the Court of Appeals have both held that the courts may sit and judicial business may be transacted on a public holiday. *Hamer v. Sears*, 81 Ga. 288; *Wood v. The State*, 12 App. 651.

And the Supreme Court has said that

"The General Assembly has not, however, seen proper to provide for an entire cessation of business on public holidays. On such days it is not lawful to note and protest bills and notes, but further than this the law does not prohibit the carrying on of business vocations." *Watson v. Mayor and Council of Thomson*, 116 Ga. 546, 547.

Stockholders' Meeting May Be Held on Holiday.

Can a stockholders' meeting be held legally on the first day of January?

The fact that New Year's Day is a public holiday does not render illegal business transactions on that day. In the absence of a by-law prohibiting it a corporate meeting may be held legally on a holiday.

Note Falling Due on Holiday, When Payable.

When should a note which falls due on Sunday be presented for payment when the Monday following is a holiday?

Such a note should be presented on the Tuesday following. The question is settled by § 4285 of the Code, which is as follows:

"All bills, checks, notes, and other evidences of debt maturing on Sunday or a public holiday shall be payable on the next business day thereafter; and all bills, checks, notes, and other evidences of debt presentable, by their terms, for acceptance or payment on Sundays or on a public holiday shall be presentable for acceptance or payment on the next business day thereafter. By business day is meant a day other than Sunday or a public holiday."

Legal Holiday Falling on Sunday.

Does the Georgia law provide for the contingency of a legal holiday falling on Sunday?

Our Code is entirely silent on the subject, and while it has been customary for the banks to observe the next day, or Monday, as a holiday in place of one falling on Sunday, it is very doubtful whether a day so observed is legally a holiday. It has been expressly held in other States that "where a holiday designated by a statute falls on Sunday, the following Monday is not a holiday, in the absence of express statutory provision to that effect."

Under the Code of 1895, § 3693, it was provided:

"Whenever any such holiday [referring to the usual holidays like the first of January, the nineteenth of January and twenty-second of February, etc.] shall fall upon Sunday, the Monday next following shall be deemed a public holiday, and papers due on such Sunday shall be payable on the Saturday next preceding, and papers which would otherwise be payable on such Monday shall be payable on the Tuesday next thereafter," etc.

In 1906 (Acts of 1906, p. 43) the Legislature amended this section as follows:

"Whenever any such holiday shall fall upon Sunday, the Monday next following shall be deemed a public holiday, and papers due on such Sunday shall be payable on the secular or business day next succeeding. Whenever either of the days shall fall on Saturday, the papers due on that day or on the Sunday following shall be payable on the business day next succeeding."

In 1907 (Acts of 1907, p. 97) a new law was passed reading as follows:

"That hereafter all bills, checks, notes and other evidences of debt maturing on Sunday or a public holiday shall be payable on the next business day thereafter, and all bills, checks, notes and other evidences of debt presentable by their terms for acceptance or payment on Sundays or on a public holiday shall be presentable for acceptance or payment on the next business day thereafter. By business day is meant a day other than Sunday or a public holiday."

This act is codified in § 4285 of the Code of 1910, and also in Park's Ann. Code.

The question, therefore, is whether the Act of 1907 repealed § 3693 of the Code of 1895 as amended by the Act of 1906, and, if not, whether the codification of the law in 1910 had that effect.

"Where the later of two acts covers the whole subject matter of the earlier one, not purporting to amend it, and plainly shows that it was intended to be a substitute for the earlier act, such later act will operate as a repeal of the earlier one, though the two are not repugnant." 26 A. & E. Enc. of Law, 2d Ed. 731 (c).

This is quoted as the law of this State in *Thornton v. The State*, 5 Ga. App. 397, and is abundantly supported by decisions of the Supreme Court.

The cases which hold that repeals by implication are not favored and will not result unless the later statute is clearly repugnant to a former one, recognize this as the rule:

"Or it must be clear from the terms of the later statute that there was a legislative intent to cover the subject matter of the former statute and have the later statute operate as a substitute therefore." *Edalgo v. Southern Ry. Co.*, 129 Ga. 258, 264.

Again:

"An implied repeal results, from some enactment, the terms and necessary operation of which can not be harmonious with the terms and necessary effect of the earlier act."

This is quoted from Southerland on Statutory Construction in *Western & Atlantic R. R. v. Atlanta*, 113 Ga. 536, 556.

It may well be argued that the Act of 1907 was intended as a substitute for § 3693 of the Code of 1895, as amended by the Act of 1906, p. 43. It will be recalled that great confusion resulted after the passage of the Act of 1906 as to when papers maturing on holidays were due, and it was to clear up this doubt and provide a simple uniform rule, easy of application, that the Act of 1907 was adopted.

The caption of the Act of 1907 is as follows:

"An act to provide for the payment and presentation for acceptance or payment of bills, checks, notes and other evidences of debt, maturing on Sunday or a public holiday, or presentable for acceptance or payment on Sundays or public holidays."

The caption, therefore, as well as the body of the act, purports, I think, to cover the entire subject. It is very similar to the caption of the Act of 1906:

"An act to amend § 3693, Volume 2, of the Code of 1895
* * * which section relates to the time when promissory
notes, etc., shall be paid in connection with a public holiday, by
striking from said section, etc."

It is true that the language of the Act of 1907 is not necessarily repugnant to that part of the previous law which provided that the Monday following should be regarded as a legal holiday, but the purpose of the Act of 1907 seems to have been to supersede the legislation on the subject.

When the history of this act is taken into consideration it seems clear that the legislature had this in mind. It appears that the last act was a substitute, and though not repugnant in all respects, was intended to supersede the prior law. Judge Hopkins evidently took this view of it, as he omitted entirely in the Code of 1910 the original section of the Code of 1895, as well as the amendment of 1906; and as he cites both the original Act of 1894 and the Act of 1906, it seems that he considered the three acts together and came to the conclusion that the Act of 1907 was intended to express the legislative intent on the whole subject.

But whether the legislature intended that the Act of 1907 should supersede all of the previous acts on the subject, I am inclined to the opinion that since the adoption of the Code of 1910, § 3693 of the Code of 1895 and the Act of 1906, except as codified in § 4285 of the Code of 1910, are repealed. It is, of course, true that the mere omission of a law from the Code does not have the effect of a repeal, but while this is true, it is also true that whatever is contained in the Code has the force and

effect of a statute, and where it appears that the codifiers with knowledge of an act omitted it and undertook to give their construction of the law or to revise it, this construction or revision becomes the law regardless of the omission. The fact that this act is cited in the margin of the section shows that the codifier knew of its existence, and the section as we have it gives his construction of the law. See as to the effect of marginal references *Barnes v. Carter*, 114 Ga. 886, 889; s. c., 120 Ga. 895, 897.

Where the Code section undertakes to deal with the subject, and the section differs from the act which is being codified, as for instance where words or clauses are omitted, the rule, as I understand it, is that the court is bound to presume that the change was made or the clause omitted intentionally. *Miller v. Southwestern R. R. Co.*, 55 Ga. 143. See also *Kennedy v. McCardle*, 88 Ga. 454. Quoting from *Verdery v. Dotterer*, 69 Ga. 194, 197:

"This provision of the law, however, is no longer of force, for in the revision of this section of this act the codifiers have confined the liability alone to mortgagees, etc. Had it simply been omitted from the Code, it might have been held still to be of force, but having revised and changed it, it is the law as it now stands in the Code."

From the marginal references, as well as from the insertion of the 1905 Code section number, it appears that Judge Hopkins undertook to put in this section the law as he understood it from the Acts of 1894, 1906 and 1907. The conclusion may be reached, therefore, that the omitted parts of those acts were intentionally omitted, and that the adoption of the Code made this section the law, regardless of what it had been before, and the omitted clauses and portions of the acts were repealed.

The question is one of much importance and of far-reaching effect. It is very doubtful, and there is no way to determine what view the Supreme Court might take of it.

HOMESTEAD.

Waiver of Existing Homestead Invalid. Proceeds of Homestead Property Also Exempt. Homestead for Wife and Minor Children Continues Until Death of Wife and Majority or Marriage of Children.

The head of a family to whom a homestead was set apart some years ago, signs a note which contains a waiver of homestead and also a statement that there are no homesteads, mortgages or liens upon the property. He subsequently claims that certain property represents the proceeds of the original homestead estate. The wife, who was the beneficiary of the homestead, has died, and the children are able to support themselves, though they are still minors. First: Would the waiver or the statement that there is no homestead defeat the homestead? Second: Would the homestead attach to the proceeds of the original property? Third: Would the homestead still subsist, notwithstanding the death of the wife?

1. While a debtor may waive or renounce his right to the benefit of a homestead, a prior homestead, that is to say, one that has already been set apart, is not affected by such waiver, but remains in full force. This has been decided by the Supreme Court in several cases. *Sigman v. Austin*, 112 Ga. 570. Nor would the statement in the note that the property is unencumbered, or that there is no homestead, lien or encumbrance thereon, defeat a homestead already set apart. This might amount under some circumstances to cheating and swindling, but it would not affect the homestead. A homestead is set apart for the benefit of the wife and minor children, and no act of the head of the family can deprive them of their interest therein.

2. The Code provides that "All produce, rents or profits arising from homesteads shall be for the support and education of the families claiming said homesteads, and shall be exempt from levy and sale except as provided in the Constitution." Park's Ann. Code, § 3398. Under this section the courts have held that the proceeds of homestead property, no matter how invested, are exempt from levy and sale to the same extent that the original homestead property is exempt.

3. The property set apart for a wife and minor children, upon the death of the wife and the majority of the children, or their marriage during minority, reverts to the estate from which it was set apart. Park's Ann. Code, § 3396. So long as the children remain minors and unmarried, the homestead would continue for their benefit, notwithstanding the fact that they might be able to support themselves.

HUSBAND AND WIFE.

Husband and Wife May Be Partners in Business.

Is an open partnership between husband and wife legal in Georgia?

While there are certain restrictions upon the right of a married woman to contract under the law of Georgia, she can nevertheless be a *bona fide* member of a partnership with her husband.

Under the law of Georgia, a married woman cannot enter into a contract of suretyship or become responsible for the debts of her husband. If the partnership with her husband is not a mere scheme to evade the law which forbids her to enter into contract of suretyship, then undoubtedly such a partnership is legal.

The precise question has been decided by the Court of Appeals in the case of *Butler v. Frank*, 7 Ga. App. 655, wherein the court said:

"A married woman may contract to become and actually become a member of a partnership with her husband or other persons; and if she does enter into such a partnership arrangement (unless it is merely colorable and devised for the purpose of evading the law), she is bound for the partnership debts."

INDORSEMENT.

Liability of Indorser.

Is an indorser liable to the same extent as the maker of a note?

Section 4279 of the Code, governing the liability of an indorser, is as follows:

"In ordinary indorsements the contract of the indorser is to pay the money if the parties to the instrument primarily liable thereon fail to pay according to the terms thereof; hence, if there are several indorsers, each is liable to subsequent ones in the order of their indorsements."

It will be noted that the indorser's contract is to pay, provided the other parties primarily liable on the paper do not. But, it will be seen by reference to § 4283 that an indorser may be sued in the same action with the maker. Of course, where suit is entered against maker and indorser, and judgment is obtained, the execution can be levied on the property of either maker or

indorser as may be most convenient to the plaintiff and the levying officer. In other words, it is not necessary to exhaust the property of the maker before levying on that of the indorser.

Indorser May Be Sued Without Joining Maker.

Can a suit be maintained against the indorser of a note without suing the maker?

I quote from Daniel on Negotiable Instruments:

"As a general rule, the holder may sue all the prior parties on the bill or note, but not any subsequent party. Thus a payee may sue the acceptor or maker. An indorsee may sue the acceptor or maker, and all prior indorsers. By the general law merchant the indorser of a negotiable instrument is bound instantly, and may be sued after maturity, upon demand and notice. But by the statutes of some of the States the maker must be first sued, and his property first subjected." Daniel on Negotiable Instruments (6th Ed.), § 1202.

Quoting again from the same author, § 1203:

"At common law, the holder of a bill or note might commence and prosecute several actions against each of the prior parties at the same time; and an action instituted against one would not preclude any other remedy against the others. But satisfaction by any one would discharge all from liability to the plaintiff as to the principal sum. But by statute in many of the States an action may be maintained and judgment given jointly against all the parties to a negotiable instrument, whether makers, drawers, indorsers, or acceptors, or against any one, or any intermediate number of them."

Quoting from the Cyclopedie of Law and Procedure:

"At common law the holder of a bill might bring several simultaneous actions against all or any of the prior parties liable to him. He could not, however, maintain a joint action against parties severally liable. By statute in many of the United States, in England, and in Canada the holder of a bill of exchange or promissory note may bring suit against the drawer or maker, acceptor or indorser, any or all, in the same action." 8 Cyc., p. 92.

The rule laid down by these authorities seems to be the rule in Georgia. I quote from a decision of the Supreme Court:

"Upon the acceptance of a bill of exchange, the acceptors become primarily liable to the payee as makers and the drawers secondarily liable as indorsers. On nonpayment he may sue either or both." Davis *v.* Baker, 71 Ga. 33.

Our statute authorizes the bringing of suit against the maker and indorser in one action in the county in which the maker resides, but it does not require that suit should first be entered against the maker or that the maker and indorsers must be sued jointly. I am of opinion, therefore, that suit can be maintained against the indorser without joining the maker.

Bank Has No Power to Indorse for Accommodation.

Can a bank indorse for an individual? If so, can it be done without the written authority from the directors?

A bank has no right to indorse for accommodation either with or without the authority of the directors.

Indorsement by Bank (to Transfer Title) Warrants All Prior Indorsements.

Where a bank places its indorsement on the back of a check which it has cashed, does it guarantee all previous indorsements, or only the signature of its immediate indorser?

I quote from Tiedeman on Commercial Paper, § 259:

"The indorser also warrants the genuineness of all the signatures to the paper. It has also been doubted whether the indorser warrants the genuineness of the prior indorsements. But this is not the conclusion of the authorities. Inasmuch as the indorser also warrants that he has a perfect title to the paper by indorsement, and is liable if his title proves defective; and since no title passes on a forged indorsement, it follows as a necessary consequence that the indorser must warrant the genuineness of the prior indorsements."

Indorsement "Pay to Any Bank or Banker or Order" Is Indorsement for Collection.

A check drawn on a bank of another city is left with a bank for collection. It is stamped by the bank with which it is left, "pay to any bank or banker or order, previous indorsements guaranteed." Before being mailed, however, the person leaving it for collection calls for it, and it is delivered to him without the stamped indorsement being erased. He takes the check to a neighboring town, and it is cashed by a merchant. This merchant deposits the check with his bank for collection, and it is returned, marked "no account with us" by the bank on which it is drawn. The check is not protested. It is afterwards returned to the drawee bank and protested. Is the bank liable on this indorsement to the merchant who cashed the check?

The only theory upon which the bank could be held liable is that the merchant cashed the check on the faith of its indorsement,

and is a *bona fide* holder without notice. I do not think he can claim to be such holder under the circumstances detailed in the question. The fact that the check remains in the hands of the original payee would seem to be sufficient to suggest that the indorsement of the bank could not have been intended as a guarantee of the payment of the check. The circumstances are sufficient to put any prudent man on inquiry as to why the bank indorsed the check, it not being drawn on such bank and its indorsement not being necessary for the negotiation of the check. Besides, the form of the indorsement suggests that it was intended as an indorsement for collection, and, therefore, limited to that purpose, and was not intended as a full indorsement, making the bank liable on the paper. Similar indorsements have been held sufficient to carry on their face notice that the indorsement is intended for collection only. The Supreme Court of Arkansas in the case of *Johnston v. Schnabaum*, 109 S. W. 1163, held that "an indorsement by a bank on a note to pay to the order of any bank or banker shows on its face that it passes title for collection only"; and the Court of Civil Appeals of Texas, in the case of *Gregory v. Sturgis National Bank*, 71 S. W. 66, held that an indorsement, "pay any bank or banker or order" shows that the bank, the holder of the draft, held the draft merely for collection, or at least was sufficient to put the drawee on inquiry as to the bank's ownership of the same.

Certainly, where the check was cashed by a merchant under the circumstances stated in the question, it would seem that the form of the indorsement would put the merchant on inquiry, and that he could not be held to be a *bona fide* holder without notice.

A check, payment of which is refused by the bank on which it is drawn, must be protested at once in order to bind indorsers. There is no authority for presenting a check the second time in order that protest may be made. Therefore, the protest made on the second presentation is entirely without effect. However, unless the paper was made payable to the bank and its indorsement was necessary in order to transfer title, protest of the paper would not be required in order to bind it as an indorser, protest being required only for the purpose of binding parties whose signatures are necessary in negotiation of the paper.

Regardless of the question of whether or not the bank would be released by the failure to protest, which as indicated would depend on whether its indorsement was necessary to transfer title

to the paper, I do not think it would be liable to the merchant, because the form of the indorsement clearly indicated that it was not intended as an unrestricted indorsement.

**Note Indorsed in Blank Is Payable to Bearer, and Holder
May Sue in His Own Name.**

Where a note is payable to the order of a named person and is indorsed by him in blank, can a subsequent holder sue on the note in his own name?

Where a paper is payable to the order of a named person, and is indorsed by him in blank, it is payable to bearer and passes freely from hand to hand, and the holder of such an instrument can bring suit on the same in his own name. This has been decided by our Supreme Court in more than one case. I quote from *Habersham v. Lehman*, 63 Ga. 383:

"Where a promissory note is payable to a named person or order, or to the order of a named person, and is indorsed in blank, it is then, until the blank is filled, payable to the holder, and any holder may receive payment or sue and collect."

The case of *Heard v. DeLoach*, 105 Ga. 500, is to the same effect.

Check Indorsed in Blank Is Payable to Bearer Notwithstanding Subsequent Limited Indorsement.

A check drawn by P in favor of L is indorsed in blank by the payee. It also contains an indorsement by X as follows: "Pay F, bank or order." Was the bank on which the check was drawn authorized to pay the check upon the blank indorsement of the payee or was its right to do so restricted by reason of the subsequent indorsement stamped thereon?

The precise question seems to have been decided by the Supreme Court. I quote from the case:

"A negotiable note being indorsed in blank (the blank still unfilled), any holder may sue the maker. A full indorsement by a person other than the payee, will not hinder the blank indorsement by the payee from operating as evidence of title in the present holder." *Habersham v. Lehman*, 63 Ga. 380 (1).

The court also says in discussing the question:

"Where a promissory note is payable to a named person or order, or to the order of a named person, and is indorsed in blank, it is then, until the blank is filled, payable to the holder, and any holder may receive payment, or sue and collect. The payee's

order to pay to any holder is not revoked or canceled by the order of some other person to pay to a particular individual."

Checks are negotiable instruments and are affected by all the rules governing commercial paper. The effect of a blank endorsement of a check is the same as the blank endorsement of a note. The rule laid down by the Supreme Court of Georgia and above quoted seems to be universally recognized. I quote again from Brady on the Law of Bank Checks, p. 56:

"A blank indorsement makes the instrument so indorsed transferable by delivery, without the holder's indorsement, in the same manner as an instrument payable to bearer. When an instrument is payable to bearer or after it is once indorsed in blank, a subsequent indorsement to a particular person, or order, does not limit its transferability. An instrument, being once made payable to bearer may, notwithstanding a subsequent special indorsement, still be transferred by delivery without the indorsement of the holder."

Under these authorities, I do not think there can be any doubt but that the bank was authorized to pay the check to the holder.

INSTALLMENT LOANS.

Not Usurious When Made by Savings Bank Which Pays Interest to Depositors, and Whose Deposits Are Not Subject to Check.

Where a savings bank, which pays interest to depositors and whose deposits are not subject to check, makes a loan on real estate, calculates interest at eight per cent. for the whole period, and divides the payments of both principal and interest thus aggregated for the entire term into monthly, quarterly, or annual installments, is the transaction usurious?

Section 2878 Park's Ann. Code provides that building and loan associations and other like associations may lend money according to the plan outlined in the question. Section 2881 of the Code, which is in the same article as § 2878, provides that,

"All the provisions of this article are to apply to all savings institutions which pay interest to depositors, and whose deposits are not subject to check."

This section was construed in the case of *Union Savings Bank & Trust Company v. Dottenheim*, 107 Ga. 606, where it was held by the Supreme Court that the Union Savings Bank, being a savings institution which paid interest to depositors and whose de-

positis were not subject to check, could charge and collect interest in the manner described.

I am, therefore, of the opinion that such a bank can make loans as outlined under the provisions of § 2881, and that loans so made are not usurious or in any sense invalid.

INSURANCE.

Any Change in Title of Property Insured Without Notice to Insurance Company Voids the Policy.

A merchant borrows from the bank and as security gives a receipt for merchandise. He delivers to the bank an insurance policy made out in his favor with a written order to the insurance company to pay over the amount to the bank in case of fire. No "loss clause" is attached to the policy. Would this transaction affect the insurance?

I think it would unquestionably void the policy. As I understand the transaction, the title to the merchandise is transferred to the bank as security for the loan. Whether this be regarded as an absolute transfer or as creating a lien on the merchandise simply, the effect, so far as the insurance is concerned, would be the same. The policy would be rendered void. The rule is that any change in the title to the property insured voids the policy. This applies not only to an absolute sale, but to a sale to secure a debt, or to the creation of a simple lien on the insured property.

Wife Witnessing Transfer of Policy Previously Transferred to Her Is Estopped to Claim Proceeds as Against Transferee.

A man transferred a life insurance policy to a bank as security for a loan. His wife, who was his business partner, attested the transfer as a witness, and benefitted by the loan. She now claims the policy had been transferred to her before the loan was made. Will she be allowed to set up this old transfer or is she estopped by having witnessed the transfer to the bank?

The wife, having witnessed the transfer of the insurance policy by her husband to the bank and having received the benefit of that transfer in the further extension of credit to the firm of which she was a member, is estopped now to assert a previous transfer of the policy to herself or to claim any benefit thereunder superior or antagonistic to the transfer to the bank. I quote:

"If the owner or a person having an interest in property represents another as the owner, or permits him to appear as such, or as having complete authority over it, he will be estopped to deny such ownership or authority, against persons who, relying on his representations or silence, have purchased or acquired an interest in the property; and generally where a person by word or conduct voluntarily induces another to act on a belief in the existence of a certain state of facts, he will be estopped, as against him, to allege a different state of facts." *Equitable Mortgage Co. v. Butler*, 105 Ga. 555.

"One who attests a deed knowing its contents, cannot afterwards stand by and see expensive work done under it on the premises, making no objection, and then assert an older adverse title in himself, and recover the premises in opposition to the deed to which his attestation gave authenticity and credit. He is estopped." *Ga. Pacific Ry. Co. v. Strickland*, 80 Ga. 776 (2).

"The true owner of property may estop himself by his conduct from asserting title to his own property, as when he stands by and allows property belonging to him to be sold to an innocent purchaser for value as the property of another. *American Mortgage Co. v. Walker*, 119 Ga. 341, and cit. Or, he may so estop himself by attesting a deed, of the contents of which he knows, made by a person who has no title. *Ga. Pac. Ry. Co. v. Strickland*, 80 Ga. 776. The negotiation of the loan from Lewman by Farrar in behalf of his wife and his attestation of her deed given to secure the loan would estop Farrar from asserting title in his own favor as against Lewman, assuming, of course, Lewman's ignorance of the true title." *Equitable Loan & Security Co. v. Lewman*, 124 Ga. 190.

"If one who held the legal title to land, though unrecorded, represented that the title was in another person who appeared from the record to be the owner, and that such other person had the right to sell and make a bond for title to the land, and thus induced an innocent purchaser for value, in reliance on such representation, to accept a bond for title from the other person, to give notes for the purchase money, and to pay some or all of them, the person so acting would be estopped from denying the title of such third person." *Sewell v. Norris*, 128 Ga. 824.

The principle is well stated in § 4419 of Park's Ann. Code:

"A fraud may be committed by acts as well as words; and one who silently stands by and permits another to purchase his property without disclosing his title is guilty of such a fraud as estops him from subsequently setting up such title against the purchaser."

The fact that the claimant is a married woman and that the policy was transferred to secure the debt of her husband makes no difference. While there are certain restrictions on the right of a married woman to contract, and while her property may not

be taken to satisfy her husband's debts, she may nevertheless be estopped by her conduct. I quote again from the Supreme Court:

"This is not a case in which can be applied the rule that any assumption by the wife of the husband's debts is void. While her power of contracting is restricted by law, yet there is no principle of law or justice that will tolerate in her, any more than in a man, the perpetration of a fraud. Even minors may be estopped by their admissions from denying the truth of them, or by their silence when the circumstances call for a disclosure of their claims or their rights, provided the minor has arrived at those years of discretion when a fraudulent intent could be reasonably imputed to him. *Whittington v. Wright*, 9 Ga. 23. A married woman has no legal rights that can exempt her from this rule of law and justice. *Dunbar v. Mize*, 53 Ga. 439 (2); *Dotterer v. Pike*, 60 Ga. 42; *Archer v. Guill*, 67 Ga. 195, 200; *Ruffin v. Paris*, 75 Ga. 654; *Henry v. McAllister*, 99 Ga. 557." *Wolff & Happ v. Hawes*, 105 Ga. 153.

"One plea of the defendant averred, that she employed an attorney to examine the title, and that the wife represented to him that the deed made by her to her husband was a deed of gift and not one of sale, and that he was induced thereby to recommend to the defendant that the husband had a good title to the property, and that the defendant was induced by such recommendation to make the purchase from the husband, and that the plaintiffs, who claimed the land as heirs at law of the wife, were estopped from setting up title thereto on the ground that the deed to the husband was void because it was one of bargain and sale, and had not been allowed by the Superior Court of the wife's domicile. *Held*, that the court committed no error in refusing to strike this plea and in admitting testimony in support thereof." *Shackelford v. Orris*, 135 Ga. 29 (6).

These cases appear to be closely in point. It is true none of the cases in which estoppels were invoked related to policies of insurance, but there is nothing sacred or peculiar about an insurance policy which would differentiate it from other transactions. In fact, there would seem to be less reason for invoking the doctrine of estoppel where real estate is concerned than where the subject matter of the contract is an insurance policy, for the law provides for the recording of deeds and makes such record notice to all the world. As I understand the question, there was nothing in the policy which was transferred to the bank to indicate that there had been a previous assignment or that the transerrer did not have full and complete control over the same.

INTEREST.

Method of Calculating When Partial Payments Are Made.

What is the proper method for calculating interest where partial payments are made?

Section 3433 of Park's Ann. Code, which covers the subject, is as follows:

"When a payment is made upon any debt, it shall be applied first to the discharge of any interest due at the time, and the balance, if any, to the reduction of the principal. If the payment does not extinguish the interest then due no interest shall be calculated on such balance of interest, but only on the principal amount up to the time of the next payment."

It is suggested that this method of calculating interest is sometimes called compounding interest and is objected to for that reason. I quote from the case of *Wade v. Powell*, 31 Ga. 3:

"It is not compound interest to add interest on the balance up to the credit, and deduct credit from the sum of principal and interest, and then to add interest on balance, etc., when the credit exceeds the interest, etc.; but such rule is the one prescribed by the statute."

This case fully settles the legality of this method and decides the precise point raised.

Computing on Basis of Thirty Days to Month and Twelve Months of Thirty Days Each to Year Is Allowable.

Are banks authorized to calculate interest on the basis of thirty days to the month and three hundred and sixty days to the year?

It is the custom among bankers, for the sake of convenience, to compute interest at thirty days to the month and twelve months to the year, and this custom is recognized in Georgia. I quote from a decision by the Supreme Court:

"The taking of interest for a portion of a year, computed on the principle that a year consists of 360 days, or twelve months of thirty days each, is not usurious, provided this principle is resorted to in good faith as furnishing an easy and practical mode of computation and not as a cover for usury." *Patton v. Bank of Lafayette*, 124 Ga. 965.

Estate of Decedent Not Exempt from Interest.

The maker of a note bearing interest from maturity dies shortly after its maturity. Is the administrator of the maker relieved from paying interest on the note for twelve months?

I know of no provision of law which would authorize the administrator to deduct twelve months' interest. The only provision relieving an administrator from the payment of interest is that found in § 4077 of Park's Ann. Code. This section lays down the rules to be used as the basis of settlement between distributees and administrators. It is provided in this section that in the settlement of estates "no interest shall be charged either way for the first year, as one year is now allowed by law for the collection of assets and to ascertain the indebtedness of an estate." But this provision is not applicable to the case stated. If the note bears interest from maturity, the holder is entitled to collect interest from maturity.

KITING.**Definition of**

What is "kiting"?

The word seems to be used in several different senses. It is sometimes understood to mean the lending of its credit by one commercial firm to another. Thus one friendly firm may borrow from another its check, draft, note, or indorsement to tide over an immediate necessity for money, the other firm, when occasion arises, returning the favor.

In Georgia, we generally use the term as meaning the mailing out of checks by a person who has no account with the bank on which the checks are drawn, or checks for an amount in excess of his balance, with a view to making up the amount by the time the checks are presented. Sometimes it goes even further than this, as for example, where a man deposits in a bank a check on another bank in which he has no funds, intending to make up the amount with the drawee bank before the check can be presented. In short, the term seems to cover almost every variety of fictitious credit built up by means of checks, drafts, notes, etc., drawn against deposits which do not exist or which do not represent *bona fide* obligations.

LANDLORD'S LIEN.

Indorsement of Rent Note Transfers the Landlord's Lien.

Does the indorsement of a rent note transfer the landlord's lien?

It was provided by the Act of 1882, codified as § 3343 Park's Ann. Code, as follows:

"Whenever any contract for rent is evidenced by writing and is transferred by written assignment before the maturity of the crops on the lands rented, the special lien in favor of landlords shall, on the maturity of the crops, arise in favor of the transferee of such rent contract in the same manner as it would have done in favor of the landlord had no transfer been made."

And by the Act of 1899, codified as §§ 3345 and 3346 of that Code, it is provided:

"All transfers and assignments of rent notes, mortgage notes, and other such evidences of indebtedness, secured either by contract lien or out of which a lien springs by operation of law, shall be sufficiently technical and valid where such transfer or assignment plainly seeks to pass the title to any of such papers in writing from one person to another."

"Upon all such transfers or assignments of any such rent note, mortgage note, or other such evidence of indebtedness as mentioned in the preceding section, such transfer or assignment shall carry together with the title thereof to such transferee or assignee also the lien connected with the same without naming or specifically transferring the lien, so that the effect of such transfer or assignment will be to completely and fully carry the lien as a necessary incident thereof."

There can be no doubt under these sections of the Code that an indorsement of a rent note transfers the landlord's lien.

LANDLORD'S LIEN FOR SUPPLIES FURNISHED.

Whether Such Lien Exists Where Supplies Furnished by Another on Order of Landlord Depends on the Circumstances.

A landlord gives the manager of a fertilizer company, in which he himself is a stockholder, a verbal order to supply his tenant with fertilizers necessary to make the crop. The company takes a note signed by the tenant but not by the landlord. The landlord, however, considers

himself liable and will pay the note at maturity if the tenant does not. Before the fertilizer note becomes due, it develops that a supply merchant has a duly executed and recorded crop mortgage on the tenant's crop. Can the landlord pay the fertilizer note, have it assigned to himself, and collect it out of the crop as against the mortgage of the supply merchant?

The only question involved on the state of facts detailed is whether, under those facts, the landlord had a lien on the crop for supplies furnished. Of course fertilizers come within the designation of supplies for the furnishing of which the landlord has a lien. And if the landlord has such a lien, it is of course superior to a mortgage on the crop held by a third person. The question, therefore, is: Has the landlord a lien under the facts set out? It is well settled by the courts of this State that a landlord has a lien on the tenant's crop only for supplies which he has furnished as landlord.

If, therefore, the landlord in this case had the fertilizer furnished the tenant merely as agent of the fertilizer company, in which he was a stockholder, he would have no lien therefor on the crop, even if he should pay the note and have the same assigned to him. This has been held by the Supreme Court in the case of *Swann v. Morris*, 83 Ga. 143, the headnote of which is as follows:

"Where a landlord, as agent, sold to his tenant guano and took a note therefor payable to his principal, and at maturity paid the note because the tenant did not do so (this being required by his contract with his principal), he was not entitled to foreclose a lien for the guano as landlord."

I understand from the question, however, that the landlord did not, as agent for the fertilizer company, sell the fertilizer to his tenant, but rather that he made arrangements with the tenant to furnish the fertilizer to him and that the landlord originally intended to be responsible to the fertilizer company for the purchase. If this is true, I think the landlord has a lien which is superior to the merchant's crop mortgage. If the landlord was a mere surety for the tenant, he would not have a lien; but if the landlord, and not the tenant, was the real purchaser of the fertilizer, the landlord undoubtedly has a lien on the crop for the amount. I quote from the case of *Scott v. Pound*, 61 Ga. 579, which supports this view:

"In order for a landlord to have a lien upon his tenant's crop for supplies, etc., the landlord must furnish the articles, and not merely become the tenant's surety for the price to some other person by whom they are sold to the tenant. The landlord may furnish them directly from his own stores, or may order them

from others on his credit, and have them delivered with or without passing through his hands. If he is the real purchaser for the tenant, the case is one for a lien, even though the joint and several note of landlord and tenant be given for the price. But if the tenant is the real purchaser in the first instance, not deriving title through the landlord, there is no lien. What the truth of the matter is, in its substance and reality, is a question for the jury."

This case was followed in the case of *Brimberry v. Mansfield*, 86 Ga. 792; *Rodgers v. Black*, 99 Ga. 139, and *Henderson v. Hughes*, 4 Ga. App. 52. I quote the first headnote in the last case cited as being an exceptionally clear statement of the law:

"While a landlord has no lien for supplies furnished by another to his tenant, and cannot acquire a lien by voluntarily assuming, without the consent of the tenant, liability for supplies to be furnished, nor obtain a lien for any preexisting debt for supplies, nor as surety for payment of his tenant's debt for supplies, still he is entitled to his lien for supplies where, at the request or with the consent of the tenant, he directs the furnishing of supplies to the tenant by an agent, and assumes sole liability for the debt thus created. In such case the authority to sell to the tenant, given by the landlord to the merchant, is an original undertaking, and not an agreement to pay the debt of another, and the supplies are indirectly furnished by the landlord, through the merchant as his agent, instead of being directly delivered by his hands."

In view of these authorities, I think that if the landlord had the fertilizer furnished at the request or with the consent of the tenant and that if he intended from the first to be liable to the company, he would have a lien, and upon paying the note could foreclose such lien as against the crop mortgage; but if the landlord acted merely as the agent of the company in selling the fertilizer or if he simply agreed, after the tenant made the note, to pay it, in case the tenant did not, he did not have a lien upon the tenants' crop, and the merchant could enforce his mortgage.

LEGAL TENDER.

Fractional Currency as.

To what extent is fractional currency legal tender?

I quote from the statutes of the United States:

"The present silver coins of the United States of smaller denominations than one dollar shall hereafter be a legal tender in all

sums not exceeding ten dollars in full payment of all dues public and private." Act of Congress, June 9, 1879, 21 Stat. L. 8, amending Rev. St. § 3586, U. S. Comp. Stat. § 6573.

"The minor coins of the United States shall be a legal tender, at their nominal value for any amount not exceeding twenty-five cents in any one payment." U. S. Rev. St. § 3587, U. S. Comp. Stat. § 6574.

By minor coins is meant, as I understand it, nickels and pennies.

LICENSE TAX.

State Bank Subject to and Must Register with the Ordinary.

Is a bank required to register with the ordinary of the county and to pay the ordinary a fee of \$1.00 for such registration?

State banks are required to register with the ordinary. Section 950 of Park's Ann. Code provides for a license tax on all business corporations. This section applies to banks. Section 978 of the Code provides that before persons upon whom an occupation tax is levied shall be authorized to carry on business they shall go before the ordinary of the county and register their names, the business they propose to engage in and the place where it is to be conducted, and that the tax levied shall then be paid to the tax collector. There seems to be no doubt that this law applies to banks, and that, therefore, they are required to register.

So far as I am able to ascertain, there is no express provision of law authorizing the ordinaries to charge a fee of \$1.00 for this registration. I understand, however, that the ordinaries generally over the State are charging this fee, and that the banks are paying it. The ordinaries claim that they get their authority to charge this registration fee by analogy to the Corporation Commissioner Act, which provides a like fee to be paid to the Secretary of State for recording the return made under that act. I do not think that this law would give the ordinaries the right to charge the fee, but they are undoubtedly entitled to some compensation for the service. The law fixing the fees of ordinaries provides that for every service required of them for which no fees are specified, the same fees shall be allowed them as are allowed clerks of the superior courts for similar services, or for a like amount of labor. Under this provision, the ordinaries could doubtless collect a reasonable fee for this service, and the amount they are charging is probably a reasonable fee.

LIENS.

Senior Contract Liens on Personal Property Not Divested by Judicial Sale.

Does a sale of personal property under execution, properly levied and advertised, divest senior liens?

Such a sale does not divest senior contract liens. I quote § 3274 of Park's Ann. Code:

"Property mortgaged may be sold under other process, subject to the lien of the mortgage. If the mortgage is foreclosed, the mortgagee may place his execution in the hands of the officer of the law making the sale, and cause the title unincumbered to be sold, and claim the proceeds according to the date of his lien."

I quote also § 3292:

"If a mortgage on realty or personality is not foreclosed, and the equity of redemption is levied on by other *fi. fas.* by consent of the mortgagor and mortgagee and the plaintiff in the *fi. fa.* levied, the entire estate may be sold, and the mortgagee claim under his lien in the same manner as if his mortgage were foreclosed."

From these sections it will be seen that the property may be levied on and sold subject to the mortgage. And it is provided by § 3275 that in such event the mortgagee, by filing with the levying officer, prior to the sale, an affidavit, giving the amount due on the mortgage and stating that he apprehends the loss of the property unless a bond is taken, may require a bond to be given in double the value of the property, conditioned not to remove the property out of the State, and for its forthcoming to answer the lien of the mortgage.

If the mortgage creditor knows of the levy and sale, he may foreclose his mortgage and claim the proceeds of the sale, or by consent between the mortgagor and the mortgagee and the plaintiff the unincumbered title may be sold and the mortgage paid without foreclosure. If no arrangement is made, and the mortgage is not foreclosed, the purchaser would buy the property subject to the lien of the older mortgage.

Holder of Junior Lien May Take Up Prior Debt in Order to Levy on and Sell Property.

How can the holder of a second deed to secure debt realize on his security?

The Code provides: That where any person other than the holder or assignee of a secured debt has judgment against a defendant who has an interest or equity in the property, the plaintiff may take up the debt necessary to be paid by the defendant in order to give such defendant legal title to the property, by paying the debt with interest to date if due, and interest to maturity if not due. When this is done, a conveyance must be made by the holder of the security deed to the defendant, and when this conveyance is recorded the property may be levied on and sold as the property of defendant, the proceeds of the sale being applied, first, to the payment of the amount advanced by the plaintiff in order to put the title in the defendant, and the balance to the payment of the execution under which the property is sold. Park's Ann. Code, § 6038.

The equity of a person who has given a deed to secure debt is not subject to levy and sale. Where a loan is made and a deed to secure debt taken and the party has already given a prior security deed, the lender would have to proceed in accordance with the section above mentioned. That is to say, he would first have to reduce his claim to judgment and then pay off the debt to the holder of the first deed, and when title was in this way put in the debtor, he could levy on and sell the property. It can readily be seen that this makes a second security deed very poor security where the amount secured by the first deed is considerable.

LOANS.

Power Conferred on Officer to Borrow Money for Corporation Does Not Generally Extend Beyond the Year.

Is a resolution passed by the directors of a corporation in 1919, authorizing the president and manager to negotiate loans from time to time, as in his judgment may be necessary, sufficient authority to such officer to secure loans on behalf of the corporation in a subsequent year?

The by-laws of most corporations provide that directors and officers shall be elected at each annual meeting, and this is customary even with those small business corporations which have no

regular by-laws. Officers are usually elected to hold office until the next annual meeting. A specific authority conferred by resolution of the board of directors would generally not be presumed to continue longer than the term for which the officer was elected, and one board of directors would not generally be presumed to have intended to provide for the carrying on of the business of the corporation beyond the next annual meeting nor to confer authority on an officer to be elected by their successors. I think, therefore, that a bank should require a resolution by the board for the current year conferring authority on the officer. This would certainly be safer.

A resolution passed by a board in 1919 would not be presumed to have been intended to bind the board elected in 1920, and in order to confer authority upon the officer a new resolution should be passed by the new board of directors. For instance, where a bank borrows money from its correspondents, a specific authority is ordinarily required for each transaction, or at least a general resolution passed at the beginning of each new year.

While this is true, it is also true that "where all of the shareholders of the corporation by their direct act or acquiescence invest the executive officer of the company with the powers and functions of the board of directors, as a continuous and permanent arrangement, there being no board of directors, or, if directors, they being entirely inactive, and the officer discharging all its duties. a mortgage on the personal property of the corporation, made and executed in its behalf by such officer to secure one who indorsed a note in order to secure a loan for it and who had to pay such loan, is valid as against the corporation." *Garmany v. Lawton*, 124 Ga. 876. If the circumstances are such as those detailed in the above quotation, a loan made by the officer would be binding on the corporation, but it would be far better to have a regular resolution by the board of directors authorizing the officer to make loans on behalf of the company.

Authority of Officer to Borrow Money Should Be Shown by Copy of Resolution of Directors Properly Certified.

How should the authority of an officer of a corporation to borrow money be shown?

Corporations can only act through their officers or agents. These derive their authority either from the by-laws or through

resolutions of the stockholders or board of directors. The board of directors in most corporations manages and controls all the ordinary affairs and business of the corporation. Stockholders and directors can only act when duly assembled in meeting held in accordance with the charter and by-laws. Minutes of these meetings should be kept and all resolutions adopted entered thereon. Of course, a corporation may be bound by acts of its officers which have not been formally authorized, by acquiescence or ratification. But authority to bind the corporation should be shown by the by-laws or by resolution duly passed by the directors or stockholders and entered on the minutes.

The regular way in which such corporate action is shown is by a certified copy of the resolution as it appears on the minutes, under the seal of the corporation, attested by the secretary. The secretary's certificate should show that the resolution authorizing the action, the loan in this case, was duly passed at a meeting of the directors or stockholders, as the case may be, regularly called in accordance with the by-laws of the corporation, and that a quorum was present. It should also recite that the resolution has been duly entered on the minutes of the company.

It is very important in dealing with an officer of a corporation that there should be no doubt as to his authority, especially when he undertakes to execute papers which are out of the usual, such, for instance, as a mortgage on the corporation's property. Bank officers cannot be too careful in requiring that an officer purporting to act for a corporation shall furnish proof of his authority in the form of a properly certified resolution of the board of directors, or stockholders, or of a by-law.

Loans to Live-Stock Dealers with Which to Buy Stock, Difficulty in Properly Securing Shown.

Can a bank safely lend money to a customer engaged in the live stock business, that is, buying and selling stock; and what kind of paper should be taken to secure advances for use in such a business?

The question does not disclose definitely the method which the customer pursues in the handling of his business. Presumably, he is buying up cattle and other stock and selling them to packing houses or other dealers, not keeping any regular stock or supply on hand, at times having none, or practically none, and at other times a large supply. What is desired is an opinion as to how a

bank can advance such a customer money to be used in purchasing live stock, the advances to be repaid when the stock is sold.

The question is by no means an easy one. Apparently there is no satisfactory method by which these advances can be made and properly secured. The bank, of course, could take a mortgage on, or a bill of sale to, the stock as it is purchased, and have these papers recorded; but when the stock was sold and the money paid over in satisfaction of the mortgage or bill of sale, additional mortgages or bills of sale would have to be taken covering each new lot purchased. This, of course, is not satisfactory.

The Code provides that a mortgage may be given covering a stock of merchandise or other articles changing in specific. But on account of the way business of this character is usually carried on, the dealer would not have on hand any regular stock which could be covered by such a mortgage, though there would be changes in its composition. Consequently, if the bank took a stock mortgage without attempting actually to describe the live stock covered, as is usually necessary, when the stock on hand at the time the mortgage was given was all sold there would be nothing on which the mortgage could operate.

It is thus almost impossible to take a mortgage or other lien on property which is constantly shifting and changing as this is, which has no fixed locality, and which cannot be described with anything like sufficient accuracy to identify it. For example, there may be ten head of cattle to-day, fifty to-morrow, and none the next day; and there may be cattle located in one place to-day, at an entirely different place to-morrow, and some at one place and some at another on the same day.

In some cases, where business of somewhat similar character was carried on, banks have entered into contracts with customers, under which they agreed to hold in trust for the bank the money advanced and all of the articles purchased therewith, and to account to the bank for the proceeds of all articles sold and to deliver at any time upon demand either the money advanced, the articles purchased, or the proceeds of any which might have been sold. In such cases the customer is constituted a special agent of the bank to use and expend the money advanced. Under a carefully drawn contract of this character, the customer would be bound to account to the bank, and if he failed to do so would be liable criminally for larceny after trust. This, however, is very poor security. The agent of the bank created in this way would

have the right to sell and the bank would have no lien on the property. If such an agent should fail to account for the proceeds of the sales, or should run off, or should dispose of the property, the bank would be practically without protection other than criminal prosecution.

If such customer owns any property, he should be given a line of credit sufficient for his requirements and secured by a mortgage on such property. A mortgage of this kind could be prepared so as to secure the amount advanced at the time the mortgage was executed and additional amounts that might be advanced from time to time, not exceeding a given sum. This would leave the customer entirely free to carry on his business in his own way, without any liens on the stock purchased and without any liability to account for the proceeds of sale. And at the same time the bank would be secured by stable property and would be protected in handling the account.

LOANS TO PUBLIC CORPORATIONS.

County Boards of Education May Borrow Money to Pay Teachers' Salaries.

Can a bank safely lend to county boards of education under the Act of 1910 (Park's Ann. Code, §§ 1548 a-g), authorizing them to borrow money to pay the salaries of teachers? Explain the operation of this law.

Where the terms of the act are complied with, the loans made under it are valid and binding, and I see no reason why a bank cannot safely make such loans. The act, however, should be carefully looked to, and it should be seen that all of its provisions and requirements are literally followed; otherwise, in case of contest, there might be considerable difficulty in enforcing the debt.

By the terms of the act, the county boards of education of the several counties are authorized to borrow a sufficient amount, and no more, to pay the salaries of the teachers in the public schools, the salaries to be paid being restricted to those of the current school year in which the money is borrowed, and the board being limited in the amount to be borrowed to the sum to which the county may be entitled from the public school fund. The act provides that the board of education shall pass a resolution, in which shall be stated the amount of money to be borrowed, the length of time same is to be used, the rate of interest, the pur-

pose for which the money is borrowed, and from whom, and that this resolution shall be entered on the minutes of the board. The bank should require a certified copy of this resolution, the certificate showing that it was adopted at a regular meeting of the board at which a quorum was present, and that the resolution had been entered upon the minutes of the board by the county school superintendent. This resolution should also show that the amount to be borrowed is not in excess of the amount which the county will receive from the public school fund. In other words, the resolution should be full and complete, and should follow the terms of the act in every respect.

The act further provides that the note shall be signed in the name of the board of education of the county by the president of the board of education and the county school superintendent. It would perhaps be well to add to the note a statement that it is given pursuant to a resolution passed by the board of education, giving the date upon which the resolution was adopted. The money advanced upon such loan should be paid over to the county school superintendent, and disbursed by him, and the superintendent is authorized to repay the loan out of any funds coming into his hands which are legally applicable to the payment.

It would be well to have the note mature at the time when the superintendent will be in funds, as the act expressly provides that no money shall be borrowed for any longer time than is necessary, and shall be paid back out of the funds coming into the hands of the superintendent.

What has been said is little more than a summary of the provisions of the act. It would be well for the officials of the bank to get the act itself, study it carefully, and see that the resolution and note itself are in accordance with the act, and that the money is borrowed, and will be used, solely for the purpose of paying the salaries of the teachers for the current school year.

NOTE.—The sections of Park's Ann. Code above referred to have been reenacted in what is known as the Georgia School Code, §§ 102-108, in exactly the same language, with the exception that instead of being limited to a sufficient amount of money to pay the salaries of teachers, the authority of the county boards of education is extended to borrowing a sufficient amount of money to pay for the operation of the public schools of their counties, and the proviso limiting this authority to salaries for the current school year is stricken. Acts 1919, pp. 328-330.

Trustees of Local School Districts Have No Authority to Borrow Money.

Can the trustees of a local school district, which is merely a subdivision of the county created under what is known as the "McMichael Act" borrow money and give notes or other obligations therefor?

I do not know of any authority for the trustees of such a district to borrow money and make a note or other obligation therefor. Any loans made to the trustees of the district would have to be made simply as a good faith proposition, the trustees having no legal right to borrow the money or execute a binding obligation therefor. Provision is made for the county board of education to borrow money in order to pay teachers' salaries, but there seems to be no provision for the trustees of the separate districts to make such loans.

Municipal Corporations Have No Right to Borrow Money Except for Casual Deficiencies in Revenue.

Is a note given by the mayor and aldermen of a municipality under authority of a resolution regularly passed at a meeting of the board legal?

The Constitution of Georgia, Article 7, Section 7, Paragraph 1, provides that:

"The debt hereafter incurred by any county, municipal corporation or political division of this State shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof at an election for that purpose to be held as may be prescribed by law." Park's Ann. Code, § 6563.

In discussing this section, Mr. Justice Cobb in the Dawson Water Works case, 106 Ga. 696, 713, says:

"It was the purpose of the constitutional provision to provide a system of finance for subordinate public corporations under which there should be each year contracts made for the expenses of the year, and these were to be paid out of moneys arising from taxes levied during the year, that is, each year's expense should be paid by taxes levied during the year, and no item of expense was to be paid except out of the taxes levied during the year in which the contract for the expense was made."

In the case of the Town of Wadley *v.* Lancaster, 124 Ga. 354, the Supreme Court held that a municipal corporation could not

lawfully purchase a fire engine and give negotiable promissory notes therefore, payable annually through a series of years, and that a promissory note given under such contract is invalid even in the hands of a *bona fide* purchaser for value before maturity.

In the case of *Tate v. City of Elberton*, 136 Ga. 301, the Supreme Court says:

"A liability for a legitimate current expense may be incurred, provided there is at the time of incurring the liability a sufficient sum in the treasury of the municipality which may be lawfully used to pay the liability incurred, or if a sufficient sum to discharge the liability can be raised by taxation during the current year. This does not authorize municipal authorities to borrow money (not to supply casual deficiencies of revenue) for the purpose of using it during the year in defraying current expenses as occasion may arise, and to give notes therefor."

The giving of promissory notes by a municipal corporation is entirely without the scheme of municipal finance provided by the Constitution. Where an unexpected deficiency in revenue arises, money may be borrowed to meet such deficiency within the constitutional limit, and a note given under these circumstances would be valid.

**Loans to Public Service Corporations Where for More Than
Twelve Months Must Be Approved by Railroad Commis-
sion.**

Has a local telephone company, incorporated, the right to borrow money without getting permission from the Railroad Commission?

Under the amendment of the Railroad Commission law increasing the powers of the Commission, jurisdiction over telephone and telegraph companies within this State is conferred upon the Commission. This seems to be true whether the company is strictly a local company or also controls long distance lines, the language of the law being, "over all common carriers * * * telephone and telegraph corporations or companies within this State." It is further provided by the Railroad Commission Act that all companies or corporations over which the authority of the Railroad Commission is extended shall be required to furnish a list of any stocks or bonds the issuance of which is contemplated, and that it shall be unlawful for any of such corporations or companies to issue stocks, bonds, notes, or other evidences of debt payable more than twelve months after date thereof, except upon the approval of the Railroad Commis-

sion, and then only when necessary and for such amount as may be required for the proper purposes of the corporation. Under this section it would be necessary before a telephone company undertook to give its notes payable more than twelve months from the date thereof for the purpose of borrowing money that the approval of the Railroad Commission be obtained. This would not apply, of course, to temporary loans to be repaid within the year.

LOSS IN MAI LS.

Loss of Package in Mails Falls on Addressee.

A bank orders stamps from collector of internal revenue, and remits therefor. The shipment is never received, but is supposed to have been lost in the mails. Does loss fall on the government or on the bank?

As soon as the stamps are mailed, the responsibility of the collector ceases. The rule is that the delivery of a shipment to a carrier is delivery to the consignee. The same rule holds with regard to delivery to the mails. When a letter is posted the forwarder has no further control over it, and whether the addressee receives the letter or not, the transaction is completed. Assuming, of course, that the collector mailed the stamps, the loss in the mails would be the bank's loss and not the Government's loss.

LOST INSTRUMENTS.

How Bank May Be Protected in Paying or Issuing Duplicates.

What steps can be taken to protect a bank in issuing a duplicate cashier's check, where the purchaser of the original claims to have lost the check, and his financial responsibility is not sufficient to warrant issuing a duplicate on his obligation to protect the bank against the lost original?

Two courses are open. One is to require the purchaser to establish the paper as a lost instrument under the provisions of the Code. Where this is done, he would have to show to the satisfaction of the court that the paper was, in fact, lost, and that it had not been transferred, and was not in the hands of an innocent holder. The court would require a bond to protect the bank from loss, in the event the original should be found.

The other course would be to require the holder of the original

check to furnish an indemnity bond, with satisfactory surety, to protect the bank against loss in the event the original should be found. In addition to the bond, an affidavit should also be required from the purchaser of the check, to the effect that the original has been lost; that it had not been indorsed, that he has made diligent search for it and is unable to locate it. This affidavit would be a protection against fraud on his part, and a bond would protect the bank against a holder who might have purchased the check from the finder thereof.

It is best to proceed according to the first method, which is the regular course provided by law, and affords generally better protection than any other.

Where the check is not very large, I think the bank would be very well protected by adopting the latter course, there being some expense attached to the first method.

Method of Establishing Lost Stock Certificate.

What is necessary for the protection of a bank in issuing a duplicate stock certificate?

The legislature in 1910 (Park's Ann. Code, §§ 5321 a-d) made full provision for the establishment of lost stock certificates and for the protection of the bank where a certificate is so established. The act provides that a petition shall be filed in the Superior Court of the county in which the bank is located, which petition shall contain a description of the lost certificate, state how its loss occurred, and pray for the establishment of a copy. The judge issues a citation, which is published once a week for four weeks and served upon the bank, calling on all persons who may be interested to show cause why the lost certificate should not be established. If no defense is made at the time fixed for the hearing, or if the defense is not sustained, a copy is established in lieu of the lost original. The act provides that when such copy is established all liability of the bank to any holder of the original certificate shall cease, and that the established copy shall take the place in all respects of the lost original.

I do not think it would be safe for a bank to proceed in any other manner than in strict compliance with the terms of this statute.

MARRIED WOMAN.

Cannot Be Surety or Pledge Her Property for Debt of Another.

Do the restrictions on the right of a married woman to become surety for another apply to personal property as well as to real estate? Can a married woman ever be held liable upon a contract of suretyship?

The restrictions on the right of a married woman to contract applies to personal property as well as to real property. Where she lends her credit to her husband or to anyone else, or pledges her property as security for the debt of another, she is not liable on the contract and may recover her property.

A married woman may, however, borrow money on her own credit and pledge her property to secure the debt, and give the proceeds to her husband or pay her husband's debt with the money, provided the loan is not made from the creditor of the husband. She can also give her husband her property, either real or personal, though she can not sell it to him without the approval of the judge of the superior court. Park's Ann. Code, § 3009.

While a married woman has the right to recover her property which has been pledged as security for the debt of another or to repudiate her contract of suretyship, she may under some circumstances be estopped to do so just as anyone else may be. In what is possibly the leading case in Georgia, a married woman stated to a creditor who had sold goods to a business with which she was connected that the business belonged to her and not to her husband. On the faith of this statement, the creditor made no effort to collect his debt, knowing that she was good. When sued on the account she pleaded that it was the debt of her husband. The Supreme Court held, however, that, the wife having led the creditor to believe that the business was hers, and the creditor having taken no steps to collect the account of her husband, she could not plead that it was her husband's debt. *Wolff v. Hawes*, 105 Ga. 153.

There may be other cases where a married woman would be estopped to reclaim her property which she had loaned to her husband or another person and upon the security of which a loan had been made, as where she had stated to the creditor that the property belonged to her husband and she had no interest in it; but where the lender knows that the property pledged by the hus-

band is the property of the wife, the wife would not be estopped from recovering the property. Nor would the act of the husband in pledging her property, although with her knowledge and consent, estop her, unless she by her own affirmative act misled the creditor.

Loan to Married Woman, Secured by Her Individual Property, Valid Though Lender May Know Money Is to Be Used in Paying Husband's Debt to Another.

Can a bank safely lend to a married woman, secured by a mortgage or security deed on her individual property, where the bank knows that her purpose in making the loan is to obtain money with which to pay her husband's debts?

It is well settled under the decisions of the Supreme Court that such a loan is valid and is binding upon a married woman. I quote from the case of *Chastain v. Peak*, 111 Ga. 889:

"If a married woman voluntarily and upon her own responsibility borrowed money and gave therefor a note and mortgage, she was bound by her contract, although her object in obtaining the loan was to raise money for the purpose of paying a debt due by her husband, and although this fact was known to the lender, if the latter was not the creditor to be thus paid, and had nothing to do with any arrangement or scheme between the husband and wife, looking to the accomplishment of the results intended."

To the same effect are *Nelms v. Keller*, 103 Ga. 745; *Johnson v. Leffler Company*, 122 Ga. 670, and *Maynard & Company v. Maynard*, 12 Ga. App. 279. Possibly the strongest case is that of *Longley v. Bank*, 19 Ga. App. 701, from which I also quote:

"Where a note is signed by a wife as principal and by the husband as surety, the presumption of law is that she gives it on her own contract and for value, to charge her separate property. *Perkins v. Rowland*, 69 Ga. 661; *Love v. Lamar*, 78 Ga. 323 (3 S. E. 90); *Temples v. Equitable Mortgage Co.*, 100 Ga. 503 (28 S. E. 232, 62 Am. St. R. 326); *Jones v. Weichselbaum*, 115 Ga. 369 (41 S. E. 615).

"Where the creditor, at the time a debt is created, really intends in good faith to extend the credit to the wife, and not to the husband, and the consideration of the loan passes legally and morally from the creditor to the wife, and where the writings then executed are such as purport to bind her for the debt as her own, then, whatever may be the private understanding between the wife and the husband, in which the creditor is not concerned and in which he has no interest, as to the disposition by the wife of the proceeds of the loan so received by her, the writings are to be

treated as embracing the true substance of the contract. Nor does it matter in such case that the negotiations relating to the loan are in fact all had through the husband, where the transaction otherwise appears to be the *bona fide* and voluntary contract of the wife. *Schofield v. Jones*, 85 Ga. 816, 819 (11 S. E. 1032); *Nelms v. Keller*, 103 Ga. 745 (30 S. E. 572); *Johnson v. Leffler Co.*, 112 Ga. 670 (50 S. E. 488); *Gross v. Whitely*, 128 Ga. 79, 82 (57 S. E. 94); *Third National Bank of Columbus v. Poe*, 5 Ga. App. 113 (62 S. E. 826)."

It is held, however, in *Gross v. Whitely*, 128 Ga. 79:

"Though a wife may contract as a *feme sole*, she can not bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, nor sell her property in extinguishment of his indebtedness. Her inability to bind her separate estate by a contract of suretyship precludes her from delivering her property in pledge for her husband's debt. A deed executed by a married woman to a third person to secure a loan contemporaneously made to the husband is void, although the wife did not bind herself as surety to pay the husband's debt which the deed was given to secure."

In *Nelms v. Keller*, 103 Ga. 746, the court say:

"The whole law of this question is comprised in the following language used by the present Chief Justice in *McCrary v. Grandy*, 92 Ga. 327: 'Under our code (§ 2488) there are three things which a married woman having a separate estate can not lawfully do. She can not bind her separate estate by any contract of suretyship, nor can she assume the debts of her husband, nor sell her separate estate to a creditor to extinguish his debts. If she should do any of these things, the transaction would be absolutely void. These are the only restrictions put upon her in dealing with her separate estate, and outside of them, she stands upon the same footing as a man or a *feme sole*.'"

Joint Mortgage of Husband and Wife Valid Though Money Borrowed to Pay Husband's Debts.

What would be the status of the bank in the event property offered as security for a loan is owned in part by a husband and in part by his wife, who both sign the note and loan deed, it appearing that the larger part of the money is to be used in paying off an incumbrance on the part of the land belonging to the husband, or otherwise used for the payment of the husband's debts?

It will be seen from the preceding opinion that

"A married woman may voluntarily and upon her own responsibility borrow money and secure the same by mortgage, although her object in obtaining the loan is to raise money to pay a debt

of her husband, and although this fact is known to the lender, if the latter is not the creditor to be thus paid, and the contract is valid and binding upon her."

If the wife may borrow for the sole purpose of paying her husband's debt, I do not think the fact that her husband signs the note and mortgage and that the mortgage includes also property belonging to the husband, would affect the question. The situation would be altogether different, of course, if the mortgage was made to an existing creditor of the husband.

It is true that it has been held that where a mortgage is given for future advances to be made to husband and wife jointly, the wife is bound only to the extent of the consideration afterwards received by her. *Dobbins v. Blanchard*, 94 Ga. 500. And it has been held also that a sale of the wife's property in part for a consideration paid to her and in part in payment of the husband's debt, can not be upheld. *Campbell v. Trunnell*, 67 Ga. 518.

So, where a married woman signs a note, the consideration of which is partly her debt and partly the debt of her husband, the payee can only recover that part which is based on her own debt. *Jones v. Harrold*, 110 Ga. 373.

But these and similar cases are based upon the fact that the lender is the creditor of the husband. Where the bank lends upon the credit of the wife, having no claims against the husband at the time, it is no concern of the bank whether the wife gives the money to her husband or uses it to pay the husband's debt. I do not think the rule would be changed because the husband also signed the note and included his property with hers in the security deed, though there is some room for the argument that the husband and the wife are each principals to the extent of the loan to each, respectively, and sureties for each other to the extent of the loan to the other, respectively.

Bona Fide Holder of Note Given by Married Woman as Collateral Is Protected.

A married woman lends to her brother a note to be used as collateral to a loan to the brother. The lender, who knows the woman is married, deposits the note with a bank as collateral. Is the bank an innocent holder, so that it can sell the collateral?

The bank is an innocent holder, and can sell the collateral. While a married woman can not bind her separate estate by any

contract of suretyship, it is yet true that a *bona fide* purchaser of a note given by a married woman will be protected.

The question does not disclose whether the note was that of a third person held by the woman or whether it was a note which she, herself, executed. If it is meant that she merely loaned to her brother a note of a third person which she held, to be used by the brother as collateral security, I do not think there could be any question that the right of the bank is superior to her right to the note.

But even if it is meant that she executed a note to her brother which she knew he was going to use as collateral security for money which he intended to borrow, the holder of the note under the circumstances detailed in the question would be protected.

The Court of Appeals has said:

"While a wife cannot legally make a contract of suretyship or assume the debt of her husband, yet where she has given a negotiable note payable to her husband's order and intended to be used as security for or in payment of his debt, and it has been transferred to a *bona fide* purchaser for value before maturity and without notice, it is valid and binds her." Farmers & Traders Bank *v.* Eubanks, 2 Ga. App. 839.

The court also says in this case:

"Where a married woman gives her individual negotiable note, the presumption of law is that she gave it on her own contract and for value, and when sued thereon the burden is on her to show that the note falls within some of the restrictions on her right to contract and that the holder of the note had notice of its invalidity when he took it."

So that in either event, that is, whether the married woman simply transferred a note which she owned to her brother, or whether she executed a note to him to be used as collateral for his debt, the bank would be an innocent holder.

MINORS.

Father Is Liable for Assessment on Stock Bought by Him in Name of His Minor Child.

Is a father liable for assessments on stock in a bank which he has bought in the name of his minor child?

The rule is thus stated in Michie on Banks and Banking, p. 1833:

"One buying stock in a national bank in the names of his minor children himself becomes liable to assessment as a shareholder, for minors are incapable of assenting to become stockholders, so as to bind themselves to the liabilities thereof."

The case of *Foster v. Chase*, decided by the United States Circuit Court of Vermont, and reported in 75 Fed. 797, is cited by Michie in support of this statement, and this appears to be the only case upon the subject. This would seem to be the correct rule in view of the principle of law that minors are incapable of contracting.

The same court holds, as is stated in Michie in a footnote on page 1833, that "the father's liability on stock bought in the name of his minor child is not affected by the fact that after the assessment, but before the suit was brought to recover it, the son became of age, and assented to holding the stock."

MORTGAGES.

Not Affected by Renewal of Original Note.

Where a mortgage or security deed specifies a certain note due at a certain time for a certain amount, but makes no provision for a renewal, can a new note be taken in renewal of the debt without affecting the security, the new note showing on its face that it is given as a renewal?

One of the requisites of a mortgage is that it must specify the debt to secure which it is given. While this is true, parol evidence may be admitted to identify a particular debt as being the same debt as that described in the mortgage. It is identity of the debt rather than identity of the note evidencing the debt which is material. So long as the debt is the same, it can always be shown to be the debt which is secured by the mortgage. Of course, there is some advantage in having the note specified definitely in the mortgage, as this relieves all question as to the indebtedness intended to be secured; but the mortgage is valid, although the paper evidencing the debt may be changed.

A Mortgage Can Not Cover Subsequently Created Debt.

A mortgage is given to secure two described notes with no provision for future advances or other indebtedness. Subsequently another note is given by the mortgagor to the mortgagee for a new and separate indebtedness, with a recital therein that it is secured by the mortgage. Does the mortgage cover this note as against third parties?

In Georgia a mortgage does not pass the title to the mortgaged property, but only creates a lien thereon. No particular form is necessary to constitute a mortgage. "It shall clearly indicate the creation of a lien, specify the debt to secure which it is given and property upon which it is to take effect." Park's Ann. Code, § 3257.

Our Supreme Court has been quite liberal in allowing parol evidence to explain or identify the debt intended to be secured, as, for instance, where a note has been renewed, it can be shown by parol testimony that the renewal note represents the same indebtedness as that described in the mortgage. So, where a note has not been accurately described or there has been some mistake in the description, parol evidence is admissible to show that it represents the same debt that was intended to be secured by the mortgage.

It has also been held that mortgages may secure not only an indebtedness described therein, but future advances to be made by the mortgagee to the mortgagor, and our statute authorizes the giving of a mortgage to indemnify a surety or guarantor, and parol evidence may be admitted to show the extent of the liability. But in all of these cases the debt secured is the original debt in contemplation of the parties at the time the mortgage was given, and not a new, separate and independent indebtedness.

The precise question as to whether parties may by agreement extend a mortgage, which by its terms is intended to secure a particular indebtedness, so as to make it cover another and different indebtedness, has not been squarely passed upon by our Supreme Court. The court, however, has in several cases intimated that parol evidence could not be admitted to show that another and different debt from that described in the mortgage was secured by the mortgage. The Georgia Court of Appeals has held:

"Parol evidence is inadmissible to extend or increase the amount of indebtedness specifically secured by a mortgage, where the mortgage does not show that it was given to secure future advances. Evidence that a mortgage was intended to secure a note not specified in it is properly repelled, in the absence of an averment that, by reason of fraud, accident, or mistake, the cor-

rect amount was not stated." *Kight v. Robinson*, 10 Ga. App. 548 (1).

The only difference between the case just quoted and the facts stated is that in the note given by the mortgagor there is a recital that it is intended to be secured by the mortgage, but in my opinion this is not sufficient to change the rule as stated by the court. I am of the opinion that the mortgage having been given to secure a specified indebtedness, and containing no language showing that it was the intention of the parties that any other debt might or could be covered by it, the mortgage was limited to the specified indebtedness, and could not be made to include another debt not in contemplation of the parties at the time it was given by a simple entry on the note to that effect.

Mortgage by Agreement May Cover Additional Indebtedness.

Where a mortgage recites that it is given to secure the described notes and that it will be satisfied only on payment of these notes and others to be made later during the year, is it good security for another note made after the execution of the mortgage but during the year specified in the instrument?

One of the requisites of a mortgage is that it shall describe the debt it is intended to secure, but it is not essential that there should be an accurate and specific description of the debt. A mortgage, for instance, may be given to indemnify a surety against any loss growing out of a particular transaction, and from the nature of the case it would be impossible accurately to describe the indebtedness intended to be secured. So it has been held that a mortgage may be given to secure advances to be made by the mortgagee to the mortgagor for the purpose of carrying on the farm of the mortgagor during a particular year. *Allen v. Lathrop*, 46 Ga. 133. I think, therefore, that in the particular case mentioned the mortgage would secure not only the two notes specifically described in it, but other notes given during the year. This might depend somewhat on the language of the mortgage, but if it showed on its face that it was intended to secure not only the notes specifically described but any other notes which might be given by the mortgagor to the mortgagee during a particular year, there can be but little doubt that it would be valid as security for the entire indebtedness.

Holder of Bond for Title May Mortgage His Interest.

Can the holder of a bond for title mortgage his interest in the property?

The holder of a bond for title can give a mortgage which would attach to his equity in the property covered by the bond. In order for the mortgagee to realize on the debt, it would usually be necessary that he should pay off the balance of the purchase money; but on doing this, he could collect not only the purchase money paid, but the amount of his mortgage, supposing of course the property was of sufficient value. The mortgage creditor of the holder of the bond could, by proper proceedings, subject to the payment of his debt, whatever equity the holder of the bond might have in the property.

The Holder of a Purchase-Money Mortgage on Personal Property Can Subject the Property in the Hands of a Second Purchaser from the Original Vendor Where Mortgage Is Duly Recorded.

A live stock dealer sells two horses, taking a mortgage for the purchase money, and deposits the mortgage note as collateral with a bank. The bank notifies the maker of the note that it holds the paper. Before the note becomes due, the maker returns the horses to the dealer, taking a receipt against the note. The dealer then sells the horses to another party. The mortgage is recorded soon after it is given. The original purchaser is insolvent, and the live stock dealer is likewise in bad financial condition. Can the bank follow the horses in the hands of the second purchaser and make the money on the mortgage note?

The question presents a good many difficulties. It is my opinion that the bank can subject the horses to the payment of the mortgage. The original purchaser could not relieve himself from liability by the return of the horses, unless he took up the note. The bank holding the note as collateral is in the same position as though it had purchased the paper outright. The live-stock dealer had no right to settle the note with the original purchaser without accounting to the bank. Whatever lien he had had been transferred to the bank, and he had no more right to take the horses and cancel the debt than any other person would have had, unless, of course, the bank authorized him to collect papers for it. In the absence of authority from the bank to collect, I do not think he could change the status of affairs. The mortgage covered the stock, and would follow it in the hands of any purchaser. If the original purchaser

sold to a third party, the bank could still follow the stock. The fact that he in effect sold or turned the stock back to the seller would not cancel the mortgage or affect the lien in any way. It is, of course, a hardship on the second purchaser to allow the bank to follow the stock in his hands. He might very well urge that he did not know of the mortgage, and had no way of finding it out, because he might search the records critically, and would hardly find the mortgage. Still, the bank could do nothing more to protect itself than to see that the mortgage was recorded; and to allow the mortgagor to sell the mortgaged property to an innocent purchaser, and thereby defeat the lien of the mortgage, would destroy the effectiveness of our recording statutes and greatly lessen the value of chattel mortgages.

The bank can perhaps do nothing to strengthen its position until the paper becomes due. When it is due, the bank would be justified in foreclosing the mortgage and levying on the stock, though as stated in the beginning this seems a hardship on the purchaser, and the bank will probably find its claim vigorously contested. The question seems to be a new one so far as the reported cases in this State are concerned.

Mortgage on Personality Properly Recorded Does Not Have to Be Re-recorded Where Mortgagor Changes Residence to Another County.

If a dealer sells mules to a party living in one county, taking a mortgage which is duly recorded, but before the maturity the purchaser moves to another county, and there gives another mortgage on the mules which is recorded in that county, is the first mortgage superior to the second?

The Code provides that "mortgages on personality must be recorded in the county where the mortgagor resided at the time of the execution if a resident of this State," also that "all chattel mortgages of stocks of goods, wares and merchandise, or other personal property shall be recorded in case the same is upon property or goods located in some other county than that of the mortgagor's residence, in the county where the goods or personal property is located at the time of the execution of the mortgage, in addition to the record of the mortgage in the county of the mortgagor's residence." Park's Ann. Code, § 3259.

It will be seen from this section that the mortgage does not have to be re-recorded on the change of the domicile of the mort-

gagor. Where the mortgage is properly recorded at the time of its execution it will not lose its lien by the removal of the mortgagor to another county.

Rank of Mortgages with Other Liens.

What liens or claims take precedence over mortgages?

Mortgages are inferior to the following liens:

- (a) Taxes.
- (b) The general and special liens of laborers.
- (c) The landlord's special lien on crops for rent and for supplies furnished.
- (d) Mechanics' liens for work done and material furnished when no notice has been communicated before the work was done or materials furnished.
- (e) Of course, mortgages are inferior to judgments, other mortgages and liens of various kinds which are of older date and recorded as required by statute, or in the case of contract liens of which the mortgagee has actual notice, except mortgages on crops for money, supplies or other articles of necessity including live stock, to aid in making and gathering such crops which are superior to judgments of older date than such mortgages on the crop for the year in which the advances were made.

Mortgages are also inferior to the year's support allowed by statute to the widow and minor children of a deceased person; and, unless it is waived, to a homestead, except in cases where the mortgage is given for the purchase money thereof, or for the removal of incumbrances thereon.

Corporate Stock Is Not the Subject of Mortgage in the Ordinary Sense.

Can a mortgage be given on shares of corporate stock?

I am unable to find any case decided by the Georgia courts on this subject. The following quotations, however, from two of the leading authorities on corporations are illuminating:

"The use of the terms 'mortgage,' 'pledge,' etc., as applied to shares is more likely to mislead than instruct. From the fact that shares held as collateral security are said by one court to be 'pledged,' and by another to be 'mortgaged,' no inference can

safely be drawn that the rights of the parties would be held to be different by the two tribunals. Terms which are useful as applied to charges upon land or personal chattels are worse than useless as applied to shares. Hence, to discuss which charges or liens upon shares in a corporation are properly denominated 'mortgages' and which 'pledges' would be largely a waste of time and battle about words. The term 'pledge' is frequently used in this work, for want of a better word, to designate a charge or lien upon shares; but the word is used as a generic term and not in any technical sense, as distinguished from a mortgage, equitable charge, or security of a different nature. All such classifications will be disregarded as unfortunate and misleading; and in lieu thereof a classification suited to the peculiarities of shares in incorporated companies will be adopted.

"Charges or liens upon shares may, then, be divided into five classes: (1) where there is an agreement, oral or written, that the shares shall be held as security for a debt, no formal transfer being executed and the indicia of ownership, notably the share-certificate, being retained in the possession of the debtor; (2) where the share-certificate is delivered to the creditor but without any transfer or endorsement sufficient to enable the creditor to have himself registered as the owner or to sell the shares in the market, without some further act on the part of the debtor; (3) where the certificate is delivered to the debtor coupled with a transfer or blank endorsement; (4) where the shares are transferred to the creditor on the books of the company but coupled with an entry indicating that they are held as collateral security merely, and (5) where the shares are transferred to the creditor on the company's books, no entry being made to indicate that they are held as collateral security and no communication of the fact being made to the company." 1 Machen on Corp., pp. 803, 804.

"Shares of stock may be the subject of a mortgage or pledge. A collateral trust indenture is often made to cover stock as security for a debt, but such an instrument would hardly be called a mortgage. In fact a mortgage of stock is not often made, and, unless there is a clear intent to the contrary, the courts will treat the transaction as a pledge rather than a mortgage. In fact it is difficult to ascertain from the cases how shares of stock may be mortgaged; and transactions which, in a few early decisions, were held to be mortgages, would to-day be held to be pledges. There are but few clear cases of a mortgage of stock to be found. It seems that a formal instrument of chattel mortgage of stock, duly executed and registered at the municipal clerk's office, as required by law in case of chattel mortgages, would not constitute an effectual mortgage of stock, and the mortgagee would not be protected where he does not receive the certificate of stock from the mortgagor, or does not obtain a registry of transfer on the corporate books." 2 Cook on Corp., pp. 1181-1183.

The Code of Georgia provides that a mortgage may embrace all property in possession or to which the mortgagor has the right of possession. Shares of stock are personal property, at least in a qualified sense. I think, therefore, that a lien in the form of a mortgage might, perhaps, be created upon shares of stock in Georgia.

I do not think, however, that the record of such a mortgage would constitute notice. Corporate stock is *quasi* negotiable in character. After being endorsed in blank it may be transferred freely from hand to hand practically as a negotiable instrument, and the purchaser or pledgee thereof can hold regardless of a judgment against the original owner, although that judgment may have been entered prior to the transfer. If a judgment is no lien on the stock it would certainly seem that a mortgage, even duly recorded, would not create a lien on the stock as against one subsequently taking it, with no actual notice of such mortgage.

The Supreme Court of Kentucky has held in the case of *Spalding v. Paine*, 81 Ky. 416, that a mortgage of stock duly recorded was not effective as against a subsequent *bona fide* purchaser of the stock. The reason for this rule is clearly stated by the court in the following language:

"Much of the business of the country is conducted on the faith of the pledge of such stock as collateral; and to adjudge that the holder of the stock by transfer on the books of the corporation, or by indorsement and delivery by the owner, is subordinate in his claim to the mortgagee, upon the doctrine of constructive notice, would paralyze trade and open a wide field for the fraudulent disposition of such valuable interests at the expense of honest and confiding purchasers."

Where a mortgage is given on stock before it had been pledged as collateral security I do not think the mortgage would hold as against the claim of the pledgee, unless the pledgee had actual notice of the mortgage when he received the stock as collateral security.

Mortgage on Property of Corporation Is Superior to Claim of Pledgee of Its Stock.

Is a mortgage given by a corporation on its physical property and tangible assets superior to the claim of holder of stock in the corporation pledged as collateral?

The mortgage is superior. All creditors of the corporation must be paid before the stockholders have any interest in its prop-

erty, and the pledge of the stock can, of course, carry no greater right to the pledgee than the stockholder himself has in the corporation or its assets.

Principal Debtor Cannot Enforce a Mortgage Given to Secure an Indorser.

A bank makes a loan, taking therefore a note indorsed by the president of the bank in whose favor a mortgage is executed by the debtor for the purpose of securing the indorsement. The bank subsequently renews the note without the indorsement. The president of the bank transfers and assigns the mortgage to the bank with the right to control and foreclose it. Can the bank legally foreclose the mortgage?

There are two separate and distinct debts. The first is the debt owed by the debtor to the bank. This is not secured by the mortgage. The second is the debt which would be owed by the debtor to the president of the bank who indorsed his note, if and when the president should be called on to pay the note which he indorsed. This is the debt which the mortgage was given to secure. The mortgage was given to secure a future contingent liability and could not be enforced against the debtor until the liability became fixed.

I quote from 27 Cyclopedie of Law and Procedure, p. 1411:

"A mortgage given to secure or indemnify an indorser or surety for a note covers any renewal of the note if the indemnitee's liability on it continues."

Again:

"A mortgage given to indemnify the mortgagee against loss or damage by reason of a liability which he has assumed for the benefit of the mortgagor as guarantor, surety, indorser, or otherwise, can not be enforced by foreclosure or sale of the property pledged until the mortgagee has been actually damaged by paying the debt or obligation assumed, or at least until he has become immediately and absolutely liable for its payment to a fixed amount, so that the fact and the extent of the injury sustained by him are definitely fixed. * * * Where a surety holds a note and mortgage for purposes of indemnity, and assigns the same, his assignee cannot enforce the mortgage until the mortgagee has paid the debt for which he was surety or has in some way been damaged." 27 Cyc. 1067.

Under this authority, the bank is not entitled to foreclose the mortgage.

NATIONAL BANKS.

Officers of National Bank Not Punishable Under State Banking Statutes.

When a state law provides for punishment of directors and bankers, does it apply to the directors and officers of national banks?

The question seems to have been answered by the Supreme Court of the United States in the case of *Easton v. State of Ohio*, 188 U. S. 220, 47 L. Ed. 452, from which I quote:

"Congress, having the power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations. * * *

"Undoubtedly a State has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. So likewise it may declare, by special laws, certain acts [such as the receipt of deposits when bank is insolvent] to be criminal offenses when committed by officers or agents of its own banks and institutions. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States."

State laws making penal certain offenses committed by bank officers or bank employes are, therefore, not applicable to national banks. For instance, it has been held that an officer of a national bank can not be punished under State laws for embezzling the funds of the bank. *Commonwealth v. Felton*, 101 Mass. 204; *Commonwealth v. Ketner*, 92 Pa. St. 372; *People v. Fonda*, 62 Mich. 401.

National Banks Prohibited from Holding Stock in State Banks.

May a national bank own and hold stock in a state bank?

A national bank has no authority to become a stockholder in a State bank or other corporation. This has been distinctly held by the Supreme Court of the United States in several cases. I quote from one of them:

"Stock of a savings bank, not taken as security or acquired in the course of the business of banking, cannot be purchased or dealt in by a national bank." *California National Bank v. Kennedy*, 167 U. S. 362, 42 L. Ed. 198.

In discussing the case, the court said:

"It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they can not rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. *Logan County Nat. Bank v. Townsend*, 139 U. S. 67, 73. No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. * * *

"The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred."

Borrowing Power of National Banks.

Can a national bank borrow a sum greater than the capital stock of the bank, and are rediscounts counted as liabilities?

Section 5202 of the U. S. Revised Statutes with amendments is as follows:

"No national banking association shall at any time be indebted or in any way liable to an amount exceeding the amount of its capital stock at such time, actually paid in, and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"1st. Notes of circulation.

"2d. Moneys deposited with or collected by the association.

"3d. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association or due thereto.

"4th. Liabilities to the stockholders of the association for dividends and reserve profits.

"5th. Liabilities incurred under the provisions of the Federal Reserve Act.

"6th. Liabilities incurred under the provisions of the War Finance Corporation Act.

"7th. Liabilities created by the endorsement of accepted bills of exchange payable abroad actually owned by the indorsing bank and discounted at home or abroad." U. S. Comp. Stat. § 9764, as amended by Act of October 22, 1919.

The reading of this section will show that the intent of the law is to limit liability of every kind and character to an amount not

exceeding the capital of the bank, except for the seven specified demands. Rediscounts are treated by the comptroller, as within this rule, as are also certificates of deposit given for borrowed money.

National Banks May Discount Paper at the Highest Rate of Interest Permitted by State Law Reserved in Advance.

Can a national bank in Georgia deduct interest in advance from a loan made at the rate of eight per cent. per annum?

The question has been decided by the Georgia Court of Appeals. I quote from the decision:

"The provisions of the acts of Congress constitute the ultimate authority relative to the operation of national banks, and the decisions of the Supreme Court of the United States will be followed by the State courts in the construction of those statutes.

"The national bank laws of Congress adopted as the authorized rate of interest that permitted by the laws of the several States where such banks might be located; but Congress did not adopt the prohibition imposed by the Georgia statute upon the taking of interest at the highest authorized rate in advance by way of discount, but on the contrary, by § 5197 of the Revised Statutes, specifically authorizes national banks to reserve, on any discount made, interest at the rate allowed by the laws of the several States." Cooper et al., Receivers, *v.* National Bank of Savannah, 21 Ga. App. 356 (1 and 2).

The Supreme Court of Georgia denied a petition for *certiorari* to review this case, indicating that it believed the case correctly decided.

The case was then carried to the Supreme Court of the United States and the decision of the Court of Appeals of Georgia affirmed. Evans, Receiver, *v.* National Bank of Savannah, — U. S. —, 34 Sup. Ct. 58, 64 L. ed. 69.

Mr. Justice McReynolds, speaking for that court, said that the court thought "Congress intended to endow national banks with the power which banks generally exercise of discounting notes, reserving charges, at the highest rate permitted for interest." He added "to carry out this purpose, the National Bank Act provides that associations organized under it may reserve on any discount interest at the rate allowed by the State."

In Georgia the legal rate of interest is seven per cent. where the rate is not named in the contract, and any higher rate must

be specified in writing, but in no event shall the rate exceed eight per cent. per annum. Park's Ann. Code, § 3426.

The taking or reserving, directly or indirectly, any greater sum for the use of money is denominated usury. Park's Ann. Code, § 3427.

It is also provided:

"It shall not be lawful for any person, company, or corporation to reserve, charge, or take for any loan or advance of money, or forbearance to enforce the collection of any sum of money, any rate of interest greater than eight per centum per annum, either directly or indirectly by way of commission for advances, discount, exchange, or by any contract or contrivance or device whatever." Park's Ann. Code, § 3436.

Under this last section, the Supreme Court of Georgia in the case of *Logansville Banking Company v. Forrester*, 143 Ga. 302, held that "the reserving of interest in advance by a bank at the highest legal rate of interest on a loan, whether it be a short or a long term loan, is usurious." Under this decision, banks organized under the laws of Georgia can not deduct interest at eight per cent. in advance even on short time paper. But under the United States Revised Statutes, which authorize national banks to take, receive, reserve and charge on any loan or discount interest at the highest rate allowed by the laws of the State in which the bank is located, and which further provide that "such interest may be taken in advance", the Court of Appeals held that a national bank was authorized to discount paper at eight per cent. All doubt upon the question has now been set at rest by the decision of the United States Supreme Court.

It will readily be seen, therefore, that the national banks enjoy an advantage over the State banks in the matter of interest. It was to meet this situation and to place the State banks on a parity with the national banks that Section 17 of Article 19 was inserted in the Banking Act of 1919. This section as originally framed provided:

"Any bank may take, receive, reserve and charge on any loan or advance of money or forbearance to enforce the collection of money, interest at the legal rate, and such interest may be taken in advance, reckoning the days from which the note, bill, or other evidence of debt has to run; provided that such interest deducted in advance shall not be for a longer period than one year; and the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of said purchase, discount or sale, at not more than the current rate of exchange for sight

drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

Had it been adopted in this form, State banks as well as national banks would have had the privilege of discounting paper at eight per cent. The legislature, however, amended the section so as to read as follows:

Sec. 19. "Any bank may take, receive, reserve and charge on any loan or advance of money or forbearance to enforce the collection of money, interest at not exceeding eight per cent. (8%) per annum."

In this form, as it was finally adopted, the section made no change in the law. State banks may charge interest at eight per cent., but can not deduct such interest in advance by way of discount. Fortunately, the legislature by the Act of 1916 substituted for the penalties imposed for the exaction of usury the forfeiture of the entire interest charged or taken, and provided that no further penalty or forfeiture should be occasioned thereby. Before the passage of this act titles tainted with usury were void. Since the act went into effect, the penalty is simply the forfeiture of the entire interest, and titles, though infected with usury, are no longer void. Park's Ann. Code, Sup. 1917, §§ 3438, 3438(a).

It is unfortunate, however, that national banks in Georgia should be accorded greater privileges than the State allows to her own banks.

NOTES.

All Persons Jointly Liable Must Be Sued Together.

Can one maker of a joint note be sued alone, without joining the others?

I quote from the decision of the Supreme Court of Georgia in *Lippincott v. Behre*, 122 Ga. 546:

"If the liability is joint, then all those jointly liable must be sued. Plaintiff has no right to impose upon one the burden of a single obligation which was assumed not severally, but jointly. He cannot sue some of the contracting parties, where all are liable as a unit, except in those cases where the statute itself has made the exception."

The statute referred to provides that where some of the joint obligors are nonresidents or cannot be found, or plead infancy and the plea is sustained, judgment may be taken against the other parties.

Most promissory notes, however, are joint and several. A note reading, "I, we, or either of us" is a joint and several note. So notes reciting the words "jointly and severally," or some similar expression, are joint and several notes. Where notes are joint and several, all the obligors may be sued or any one of them. Reference to Park's Ann. Code, § 4270, will explain somewhat the difference between joint, and joint and several notes.

A Nonresident Indorser Cannot Be Sued in Same Action with Resident Maker.

Is it necessary to sue in one action the maker of a simple promissory note, who resides in Georgia, and an indorser on the note, who resides in another State?

While under our statute the maker and indorser of a note, who reside in different counties, may be sued in the same action in the county of the residence of the maker, the courts of Georgia have no jurisdiction in an ordinary suit to give judgment against a nonresident. Of course, if the nonresident happened to be caught in the State of Georgia, he could be sued in any county in which he could be served; but, residing out of the State, he could only be sued by attachment levied on any property which he might own within the State, or by service of garnishment on some resident debtor of his or person holding property for him. Suit would have to be brought against the maker in Georgia, and in the other State against the indorser, unless the indorser could be caught in Georgia and served while within the State.

Maker and Indorser of Promissory Note Cannot Be Sued Jointly in County of Indorser's Residence.

Can both the indorser and the maker of a note who reside in different counties be sued in the county of the indorser's residence?

Suit against the maker and the indorser cannot be brought in the county where the indorser resides. Both can be sued in the county of the maker's residence. The constitutional provision embodied in § 6542 of Park's Ann. Code is as follows:

"Suits against the maker and indorser of promissory notes, or drawer, acceptor and indorser of foreign or inland bills of exchange, or like instruments, residing in different counties, shall be brought in the county where the maker or acceptor resides."

Where the indorser is not a technical indorser, that is, one whose indorsement is necessary to pass title to the instrument, but is merely a surety, the rule is different. In such case the maker and indorser can both be sued in the county of the indorser's or surety's residence.

Reference in Face of Note to Contract Under Which It Is Issued Does Not Affect Its Negotiability.

An entry upon the face of a promissory note recites that the note is one of a series subject to a contract of given date, to which reference is made. Does this render the note nonnegotiable?

An entry of this character upon the face of the note makes the paper referred to a part of the contract. It does not affect the negotiability of the note, but the purchaser is put on notice of any fact contained in the paper referred to which might be a defense to the note. References of this character are very frequently found in purchase-money notes, rent notes, note retaining title to property sold, and notes secured by mortgage or deed to secure debt. The fact that a note shows upon its face, or by reference to another paper, what its consideration is, does not prevent it from being negotiable, nor is the purchaser charged with notice of failure of consideration or put on any inquiry with regard to the consideration by reason of such a statement in the body of the note. This has been frequently decided by the Supreme Court. *Bank of Commerce v. Barrett*, 38 Ga. 126.

The effect of the reference is, therefore, to embody in the note the terms of the contract referred to; and unless there is something in the contract which shows that the note is conditional, or that the consideration upon which it was given has failed, or that the consideration is illegal, immoral, or against public policy, or some other defense of this character, the fact that the note refers to the contract and that by this reference the consideration is shown, would not affect its negotiability, nor charge the purchaser with any secret defense which the maker might have which could not be ascertained from a reading of the contract. *Simmons v. Council*, 5 Ga. App. 386.

Provision for Indefinite Renewal or Extension Renders Note Nonnegotiable.

Does the statement in a note that the indorser consents to a renewal or extension affect the negotiability of the paper?

I am inclined to think, under the authorities, that the statement that the indorser consents to a renewal or extension renders the note nonnegotiable.

In the case of *Woodbury v. Roberts*, 59 Iowa 348, 13 N. W. 312, the note under consideration contained the following clause: "The makers and indorsers of this obligation further expressly agree that the payee or his assigns may extend the time of payment thereof from time to time indefinitely as he or they may see fit." The court held that the note was not negotiable, because the time of payment was not certain, and not capable of being made certain.

In the case of *City National Bank v. Gunter*, 67 Kan. 227, 72 Pac. 842, a note provided that the makers and indorsers "agree to all extensions and partial payments before or after maturity without prejudice to holder," and it was held that the note was not negotiable, the holding being based on the same ground as that set out by the Iowa court in the case referred to above.

The Supreme Court of Iowa, however, in a later case, lays down the rule a little less broadly. The notes involved in that case contained the following provision: "Sureties hereby consent that the time of payment may be extended from time to time without notice thereof," and the court said: "We may concede that in the case of an instrument providing in terms for extension of time of payment indefinitely, there is such uncertainty as to make the same nonnegotiable. But in the notes before us, we have a distinct and unqualified agreement on the part of the makers to pay on a certain date. And we perceive no good reason for holding that the negotiable character thereof is destroyed, because of a clause embodied therein providing that a surety, if such there shall be, will not claim a release from his collateral liability on the instrument, if forsooth an extension of time shall be granted the makers without notice to him." *Farmer v. Bank*, 107 N. W. 170.

I think that the clause stated in the question would probably be held to make the time of payment of the note uncertain, and, for that reason would, perhaps, render it nonnegotiable. Such a clause would not, it seems to me, come within the ruling of the last case cited for it is not a clause in its terms waiving notice of an extension simply, but affirmatively agreeing to such extension.

The question is a close one. No one can say with certainty just how the courts would decide it.

Note Is Negotiable Though Appearing on Its Face to Be a Renewal.

A note which a bank took in the regular course of business before maturity, discounting the same for value, matures, and the bank is offered a new note with the word "renewal" written on it. Would the bank be considered a *bona fide* holder of this new note, or would the fact that the word "renewal" is written in it charge the bank with notice of any defenses?

It is well settled that "where a negotiable instrument is transferred before its maturity in payment of a preexisting debt, the transferee is a holder for value and takes the paper free from the equities existing between the original parties." *Harrell v. National Bank of Commerce*, 128 Ga. 504.

This being true, the bank would occupy the position of a *bona fide* holder in taking the renewal note under the circumstances mentioned. The fact that the note shows on its face that it was a renewal would not prevent it from being a negotiable paper or charge the holder with notice of any defenses. It has been frequently held in cases where a note showed on its face what the consideration was, that this did not prevent it from being a negotiable instrument or render it subject to equities. So words on a note indicating that it is a mortgage note or a purchase-money note, or other words of like character, have been frequently held not to affect the negotiability of the paper or to put the holder on notice of equities existing between the original parties.

Bill of Exchange or Draft Payable "With Exchange" Is Negotiable.

Is a bill of exchange or a promissory note payable in exchange or with exchange negotiable under the law of Georgia, or is it nonnegotiable because the amount is not definitely fixed?

I do not think the question has ever been decided by the Supreme Court or Court of Appeals of Georgia. The courts in other States are in hopeless conflict, though I am inclined to think that the majority of them, and most of the leading text writers on the subject of commercial paper, hold such a bill of exchange

to be negotiable. The Uniform Negotiable Instruments Act, which has been adopted in most of the States, provides:

"The sum payable is a sum certain within the meaning of this act, although it is to be paid * * * (4) with exchange, whether at a fixed rate or at the current rate." (Section 21.)

While the question seems not to have been decided in Georgia, I think such bills are regarded in this State as negotiable, and I believe our courts would so hold.

It is very unusual to make a promissory note payable with exchange. In fact, I do not think I ever heard of one so payable. Notes are usually made payable at a particular place, and there is no occasion for the collection of exchange on them, as there is in the case of bills of exchange or drafts. The question whether a note made payable with exchange is negotiable has not been decided in Georgia. I do not think this would affect its negotiability. The fact that a note bears collection charges, including ten per cent. attorney's fees, has been held by the Supreme Court not to prevent it from being negotiable.

Demand Note Being Due Immediately There Can Be No *Bona Fide* Holder Thereof.

Is the holder of a note, payable on demand, a *bona fide* holder where he has received the note by indorsement six months after it was executed?

Section 4292 of Park's Ann. Code provides that notes payable on demand are due immediately. Section 4286 of the Code provides that a *bona fide* holder for value of a note, who receives it before it is due and without notice of any defect or defense, shall be protected from defenses set up by the maker. Section 4287 of the Code says that if the holder receives the note after it is due, its nonpayment at maturity is notice to him of dishonor. As a note, payable on demand, is due immediately, one who receives such note after its date can not be a *bona fide* holder, because he takes it after it is due.

**Purchase-Money Notes of Land Are Good Collateral,
Especially Where Indorsee Also Holds Title to the Land.**

1. Are purchase-money notes for land where bond for title is given, good collateral?

2. Where such notes are discounted at a bank and are paid, to whom does the maker look for a deed?

1. Purchase-money notes for land are usually considered good collateral, and are frequently discounted. It should be borne in mind, however, that if such notes are transferred without recourse and there is no deed from the seller to the bank, or where the notes are payable to bearer, and they are transferred without indorsement and no deed made, the transfer of the notes of itself conveys the title from the seller to the purchaser, and the bank could only look to the responsibility of the purchaser on the note, and would have no claim on the land. Where the notes are regularly indorsed to the bank, especially where a deed is made from the seller to the bank, subject to the bond for title, or a contract to convey is made, the bank would hold as security for the notes the reserved title of the seller, and could subject the land to the payment of the notes. The proper way to handle these notes is to have them indorsed to the bank, and have the seller make a deed to the bank subject to the outstanding bond for title. Where this is done the purchase-money note is first-class security, supposing, of course, that the land is worth more than the amount of the note.

2. When purchase-money notes, which have been discounted, are paid, the purchaser would look to the bank for a deed, provided the seller had deeded the property to the bank, subject to the bond. Where the notes were transferred and no deed made to the bank, he would have to look to the seller. The payment of the notes would give him a perfect equity in the land, and he could compel the holder of the legal title to convey, whether this happened to be the bank or the original seller, and as stated above, if the note is transferred without recourse, or is payable to bearer and is transferred by delivery, the transfer itself would operate to vest the title in the purchaser.

**Maker of Note Payable at Named Bank Liable Thereon
Though Not Presented at That Bank.**

A bank discounts for a customer a note payable at a named bank in another city. The note is sent to the first bank's correspondent in that city, the correspondent not being the bank at which the note is payable. The maker goes to the bank at which the note is payable on the day it

matures and asks for it but is told it is not there. The note is subsequently presented at the maker's office by the correspondent of the first bank and he refuses payment on the ground that the note is payable at the other bank. Can the bank presenting the note protest it? Can the maker compel the holder of the note to send it for collection to the bank at which it is payable?

In so far as the maker of the note is concerned, the question is answered in an early decision of the Supreme Court, where it was held that a demand is not necessary to charge the maker of a note payable on demand at a particular place. The court further held, however, that the defendant could plead readiness to pay at the place stipulated, or damages sustained by himself in consequence of the neglect or omission to make the demand, and that upon proof of his plea the plaintiff could not recover costs and damages, and that the defendant would be exonerated to the extent of the damages which he had sustained. *Dougherty v. The Western Bank of Ga.*, 13 Ga. 288.

The maker of the note in question would be liable and could be forced to pay by suit without any presentation of the note or demand for payment, either at the bank where it was payable or elsewhere.

As to indorsers, however, the rule is different. Where the place of payment designated in a note is a particular bank, presentation and demand at the bank are necessary in order to charge an indorser. The correspondent bank, therefore, could not protest the note without presenting it at the place designated therein.

Where Check Given in Payment of Note Is Not Paid, Surety Is Not Released Though Note Marked Paid and Delivered to Maker.

Are sureties or indorsers relieved when the note upon which they are secondarily liable is paid by check of the maker, the note being marked paid and delivered to the maker?

It is well settled that a check or draft is not payment until it is itself paid, unless it can be shown that it was the intention of the parties that it should be so treated. The marking of the note paid and delivering it to the maker would not alone be sufficient to take the transaction out of the general rule. This has been expressly held by the Supreme Court in the case of *Kinard v. First National Bank of Sylvester*, 125 Ga. 228. In this case a note was marked paid and the mortgage securing it cancelled, and the note and mortgage were delivered to the maker. But in

spite of this the bank was allowed to foreclose its mortgage. The fact that other parties are also liable on the note would not change the rule. Of course, the bank would be under obligation to these parties to use reasonable diligence in the collection of the check, but only the same diligence would be required in this case as would be required in the ordinary case of collection of a check.

Bank Can Collect Note Given in Payment of Its Stock.

A subscriber for stock in a bank borrows money from another bank with which to pay for his stock, giving his note therefor. The bank issuing the stock subsequently bought the note and renewed it. Can that bank enforce payment of the note?

The bank can enforce payment of the note, regardless of the fact that the original indebtedness was created for the purchase of its stock. The note was not given to the bank which issued the stock, and there was no agreement or understanding that that bank should take it over. But even if there had been, this would not be a defense so far as the debtor is concerned. He owes the debt, and the bank ought to be able to enforce payment. The fact that the note was originally given for money used to purchase stock in the bank would not be a defense to the note.

Judgment Notes Are Unknown in Georgia.

Can the maker of a note in Georgia in the body of the note authorize an attorney in fact to confess judgment for him on the note if not paid at maturity?

Judgment notes, as they are usually called, that is, notes "embodying an authorization to any attorney or to a designated attorney, or to the holder, or the clerk of the court, to enter an appearance for the maker and confess a judgment against him for the sum named therein, upon default of payment of the note," are not known in Georgia. Whether such a warrant or power of attorney would be valid in this State seems not to have been decided. The text writers agree that in the absence of a statutory prohibition such notes are valid. As we have no statute prohibiting such notes, it is probable that they would be upheld in this State. The reason doubtless that such notes have not been used is that in Georgia judgments must be rendered at regular terms of the court and suits must be filed a specified number of

days before the convening of the term. Park's Ann. Code, § 5954. Our statutes provide that in the event of the failure of a defendant to file his answer, judgment by default may be entered against him. While confessions of judgment are not unknown in Georgia, there is very little reason for such confessions, as the same result is accomplished by taking judgment by default. In the event a note should contain a power of attorney authorizing the confession of judgment thereon, suit would have to be filed on the note in precisely the same way as though it contained no such power and the same length of time would have to elapse between the filing of the suit and the entry of judgment, otherwise the judgment would be void as to third persons. *Ainsworth v. Mobile, Etc., Co.*, 102 Ga. 123. There is, therefore, little or no advantage in having such a power of attorney to confess judgment embraced in the note. In the States where judgment notes are common, the statutes usually provide for a quick method of obtaining judgment. In many of them the clerk is authorized to enter up judgment and issue execution immediately. Of course, where this practice prevails, a judgment note is quite an advantage over an ordinary promissory note.

Debtor Is Not Entitled to Interest on Partial Payments Made Before Maturity, Where Note Payable at Fixed Date.

A note is payable at a fixed date, and draws interest from date. Certain payments are made on the note which are properly credited on the back. At the time the payments are made there is no agreement, express or implied, with regard to interest. Does interest stop on the amounts credited from the dates of payment?

The precise question has been decided. In the case of *Blackshear Manufacturing Company v. Stone*, 8 Ga. App. 661, it is said:

“Where a promissory note is payable on a fixed day, and not ‘on or about’ a fixed date, and the debtor makes payments before the maturity of the note, he is not entitled, in the absence of an agreement to the contrary, to interest on the payments from the time they are made up to the date the note is due.”

Place of Signature of Surety on Note Immaterial.

Is a person who signs a note as security outside the border of the note, but on the face of it, liable on the note?

There is no doubt that a party so signing a note can be held liable. The question is settled by the decision of the Supreme

Court in the case of *Quin v. Sterne*, 26 Ga. 223, from which I quote:

"Where the signature of a party is put, at the time it was made, upon a promissory note, payable to another or bearer, and held by the payee continuously from the execution and delivery of the note, the location alone of the signature is not to control in settling the liability of the parties.

"The signature of the maker of a note is usually below, at the right hand; it is not essential, however, that it should be there; and it matters not in what part of the note it is placed, provided it can be ascertained who the maker is. And the same doctrine applies to indorsers."

OFFICERS.

Notice of Resignation of Not Required.

Does the law make it obligatory upon an officer of a bank, in the event of a desire to resign, to give a certain number of days' notice to the bank, and if so how many days?

An officer of any corporation may resign at any time without previous notice to the corporation, unless his contract of employment or the by-laws of the corporation restrict him in doing so. Of course, by contract the right of an officer to resign or the time when the resignation shall take effect may be limited, and the same effect may be accomplished by a by-law provision. In the absence of any provision in the contract of employment or in the by-laws, an officer may resign when he sees fit and without any previous notice of his intention to do so.

Guaranty of Note by Officer for Compensation Valid, but Practice Disapproved.

Can the president of a national bank guarantee the payment of a debt due the bank by one of its customers, accepting from the customer compensation for his guarantee?

An officer of a national bank is not forbidden to borrow from the bank, either directly or indirectly. Of course, the president would not be authorized to make loans to himself or to another person on the strength of his guarantee, but the board of directors or the committee of the board having authority to make loans could lend either to the president or to some one else on the

strength of the president's indorsement or guarantee. I do not think there would be any legal reason why the president should not be compensated for the risk which he would assume in guaranteeing a paper of a customer.

Of course, the president could not make a profit at the expense of the bank or be personally compensated for lending the funds of the bank, but if the payment is made not for securing the loan, but as compensation for the risk assumed, and if the loan is made by the board of directors or a duly authorized committee, and not by the president, I think the transaction would be legal in spite of the fact that the president received compensation for his guarantee. Such a transaction, while legal, is of very doubtful propriety, however. It is very easy to see how it might be abused by the president's refusing to approve loans to a customer unless he was paid something for guaranteeing it. There is also danger, where the president is himself liable, of the bank's interest suffering because the paper is not pushed sufficiently.

I thoroughly disapprove of any transaction where an officer of the bank assumes a position which may be antagonistic to the bank or out of which he gets, even legitimately, any personal benefit. Where the transaction is explained to, and approved by, the directors, the president, of course, would be bound on his guarantee, and the original debtor would also be bound, and the bank would seem to have no concern as to what was paid to the president personally for assuming the obligation; but I think it would be very much better to handle the transaction in some other way and to avoid the appearance of evil and the temptation which such irregular transactions almost inevitably produce.

NOTE.—Section 209 of the Banking Act of 1919 makes it a misdemeanor for an officer to accept compensation for making a loan.

Officers Are Liable for Allowing Overdrafts Unless Authorized by Board of Directors.

What is the liability of officers of banks who allow overdrafts?

One of the earliest cases on the subject is *Minor v. Bank*, reported in 1 Peters (U. S.) 46. That was a suit on a cashier's bond, in which it was claimed that he was liable for having allowed overdrafts. He sought to justify on the ground that the usage and practice of the bank excused him. Said Mr. Justice Story:

"What is that usage and practice, as put in the case? It is a usage to allow customers to overdraw, and to have their checks and notes charged up without present funds in the bank; stripped of all technical disguise, the usage and practice thus attempted to be sanctioned, is a usage and practice to misapply the funds of the bank, and to connive at the withdrawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty, both of the directors and the cashier, as cannot receive any countenance in a court of justice. It could not be supported by any vote of the directors, however formal; and, therefore, whenever done by the cashier, is at his own peril, and upon the responsibility of himself and his sureties. It is anything but 'well and truly executing his duties, as cashier.'"

This is, however perhaps an overstatement under present conditions, even if the Supreme Court of the United States is the authority quoted.

The commonly accepted rule is somewhat fully stated in the 1917 Edition of Morse on Banks and Banking, §§ 357, 358. In discussing the nature of overdrafts, the author says:

"In fact, it is nothing else but a loan and a loan of a very dangerous and irregular description, wherein the bank has no security whatsoever beyond the right of action against the drawer. If a cashier, not authorized, as cashiers seldom are, to loan the funds of the bank, or if the paying teller, who probably never has such authority, pay the overdraft of a customer without specific power from the government of the bank, but simply of his own individual motion, his act is, in the eye of the law, a breach of his trust. They have used the funds and property of the bank in a manner which the law does not authorize, and in which they have not even a color of right to use them. They have imperilled the safety of corporate money by loaning it, and the fact that it is to a customer whom they believe to be rich and honest, and a man whom it is desirable to favor, does not prevent the transaction from being a transgression beyond the limits of their power and duties. * * * The fact that in banking business such things are often done, and that their true character is hardly recognized or appreciated by the actors in them, is perhaps a moral extenuation, but it is certainly no legal excuse. The language of the adjudicated cases is not capable of being explained away. Such a course of dealing, long carried on by a cashier or teller with the knowledge and express or tacit approval of the bank directors, may possibly relieve him from liability to them. * * * Of course, however, there is a power in the bank to allow overdrafts. By negotiating with the authorized and proper officials a customer may make a legal and binding arrangement by which his overdrafts to a certain amount named and under the circumstances agreed upon shall be honored." 1 Morse on Banks and Banking, §§ 357, 358.

NOTE.—Section 160 of the Banking Act of 1919, enacted since this opinion was written, provides: "Any officer, or employee, of any bank who shall permit any customer of the bank to overdraw his account or who shall pay any check or draft, the paying of which shall overdraw any account, unless the same shall be authorized by the board of directors or by a committee of such board authorized to act, shall be personally and individually liable to such bank for the amount of such overdraft?"

PARTNERSHIP.

Notice of Dissolution Necessary to Relieve Partner from Subsequent Acts in Partnership Name.

After the dissolution of a partnership, the partner who managed the business gives a note in the firm name for money borrowed, representing that the firm is still in business. Is the other partner bound?

Upon the dissolution of a partnership, notice of the dissolution should be given to the public by published advertisement; in addition to this, all persons with whom the firm does business should be notified personally of the dissolution. If no such notice is given, a person who has previously dealt with the firm and who has no knowledge of the dissolution or notice of sufficient facts to put him upon inquiry, can hold all members of the firm for an indebtedness incurred after dissolution, in the firm name, and in the regular way in which the firm has been accustomed to do business. Park's Ann. Code, § 3163.

PASS BOOK.

Entries in Pass Book Not Conclusive Against the Bank.

Does an entry erroneously made in a depositor's pass book prove conclusively a liability against the bank?

A credit entry in a pass book is the bank's receipt for money deposited. No receipt is conclusive, but can always be shown to be erroneous, if, in fact, it is erroneous.

The Supreme Court of Georgia has answered the question in the case of *Bank of Lawrenceville v. Rockmore*, 129 Ga. 582, in which the court says:

"A bank pass book is evidence, but not conclusive evidence, of the amount due to a depositor."

**Money Erroneously Credited to a Depositor and Checked Out
May Be Recovered Although Pass Book and Checks
Destroyed.**

A depositor checks out his entire balance. He then destroys all his old checks, pass books, deposit tickets, etc. Some two months after the account is closed the bank discovers that through an error he has been credited with \$200.00 that should have gone to another account. Can the bank recover the amount?

The entry of this deposit was a mistake. The depositor was given credit for an amount to which he was not entitled. When he checked out his balance, including this sum, he received \$200 of the bank's money. I know of no reason why he should not be required to account to the bank for this money erroneously paid to him. The fact that it was entered presumably in his pass book does not, it would seem, change the rule. Some of the earlier cases held that the entry in a pass book was conclusive against the bank, but this rule has been changed by the later decisions. I quote from Bolles on the Modern Law of Banking:

"Formerly entries in a pass book were regarded in a more technical manner than they are to-day. Once, an entry made by a bank officer at the time of receiving a deposit was deemed original and binding on the bank, but not on the depositor; and on neither when the entry was made afterward by copying from the ledger. The modern law has swept away all this refining. The rights of neither party are absolutely fixed by the entries, and they are always 'open to examination and correction.' *Prima facie* they are correct, but not conclusive." Bolles on The Modern Law of Banking, p. 467.

This is the rule in Georgia. See *Bank v. Rockmore*, 129 Ga. 582, quoted in the preceding opinion.

In a somewhat similar case in which the error had been in the bank's favor instead of against it, the Supreme Court of the United States used this language:

"It comes to this, then, that upon a settlement of accounts between them, a credit was by mistake allowed to the bank to which it was not entitled. The law is, that neither party is to be benefited or to be injured by the mistake. The bank must refund the amount by handing over the sum, or by crediting the same to Mr. Spinner in his next account. Mistakes in bank accounts are not uncommon. They occur both by unauthorized or pretended payments, as well as by the omission to give credit for sums deposited. When discovered, the mistake must be rectified, and an ordinary writing up of a bank book, with a return of vouchers or a statement of accounts, precludes no one from ascertaining the truth and claiming its benefit." *First National Bank v. Whitman*, 94 U. S. 343, 24 L. Ed. 229.

The destruction of the pass book, cancelled checks, etc., does not affect the question at all. It may make it much more difficult for the mistake to be established, but if it is clearly shown the destruction of the evidence could not affect the question of liability.

Furnishing Statement of Account Is Equivalent to Balancing Pass Book.

Has a monthly statement of a depositor's account returned with his cancelled checks the same effect as entering the checks and striking the balance in the pass book as is usually done?

The effect of balancing a customer's pass book and returning his checks is simply stating the account between the bank and the customer. Furnishing a statement of the account, with accompanying vouchers, has precisely the same effect as balancing the pass book. It is more convenient, as it can be regularly done without waiting for the pass book to be presented. It is usually adopted as between banks, and many banks are now using it with their customers.

Printed Rules in Savings Bank Pass Book Binding on Depositor.

Is a printed rule in a savings pass book that payments made to a person presenting pass book shall be good and valid on account of the owner, legal and could it be enforced in a case covered by it?

There is no doubt under a decision of the Supreme Court that such a rule is reasonable and binding upon depositors. The Supreme Court said in the case of *Langdale v. Citizens Bank of Savannah*, 121 Ga. 105:

"A rule providing that 'Every effort will be made to protect depositors against fraud, but payment made to a person presenting pass book shall be good and valid on account of the owner, unless the pass book has been lost and notice in writing given to (the) bank before such payment is made,' is reasonable and binding upon depositors."

As to whether or not the rule can be enforced in a case to which it is applicable, seems to depend on whether there are any circumstances to arouse the suspicion of the bank when the book is presented by a person other than the owner. If there are no such circumstances and no negligence can be imputed to the bank in the payment, then the bank is not liable if the pass book is pre-

sented. The Supreme Court in the case above cited states the law as follows:

"Under the terms of such a rule, where a pass-book is presented by a person other than the depositor to whom it belongs, together with a forged check bearing a signature similar to that of the depositor, and there is nothing to arouse the suspicion of the teller or put him upon inquiry, as a reasonably prudent man, as to the genuineness of the check, and the bank in good faith pays the check, believing the person presenting it to be the depositor, it is not liable in a suit by the depositor to recover the money so paid."

The principle of this case has been recently reaffirmed by the Court of Appeals of Georgia in the case of *Wilson v. The Citizens & Southern Bank*, 23 Ga. App. 654, 99 S. E. 239.

POST-CARD NOTICES.

A Notice of Maturity on a Post-Card Is Not Nonmailable.

Is a postal card notice that a bank holds a note or draft on the party addressed, giving the date when the paper is due and stating that it will be held until a certain date, in violation of the Act of Congress making certain matter nonmailable?

The Act of Congress declares nonmailable any postal card upon which are

"Any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, *defamatory*, or *threatening* character, or calculated by the terms, or manner, or style of display, and obviously intended, to reflect injuriously upon the character or conduct of another." (Italics mine.) U. S. Penal Code, § 212.

A mere notice that a bank holds for collection a paper, unaccompanied by any threat and with no language of any sort which could possibly reflect on the person addressed is not nonmailable.

POWER OF SALE.

In Collateral Note Not Revoked by Death of Maker.

Does the death of the maker of a note secured by collateral revoke a power of sale contained in the note?

In 1894 the legislature passed an act providing that where a creditor advances money upon the pledge of a certificate of stock

or other script representing an ownership or interest in a corporation in Georgia, he shall have an irrevocable interest in such certificate, which is not affected by the death or disability of the person in whose name the stock stands on the books of the company, and the same rights after the death of the pledgor as before. Park's Ann. Code, § 3575.

The same section provides that, while an agency is generally revocable at the will of the principal and that death revokes a power, if the power is coupled with an interest in the agent himself, it is not revocable.

A bank holding collateral with a power of sale, in the event the debt is not paid, would have such an interest as would make the power irrevocable. This is true in the case of a power of sale in a security deed. See *Roland v. Coleman*, 76 Ga. 652; *Baggett v. Edwards*, 126 Ga. 463.

The situations of the grantee in a deed to secure debt and the holder of a note secured by collateral are very similar. Section 3532 of Park's Ann. Code provides that the general property of goods pawned remains in the pawnor, but the pawnee has a special property therein, and that the death of neither party interferes with their respective interests. As the pawnee has an interest which is not affected by the death of the pawnor, and has by the terms of the instrument creating the pledge a power, he would have a power coupled with an interest, which under § 3575 would not be revoked by the death of the pledgor.

PROTEST.

County Warrants Not Protestable. General Discussion of Protest and What Papers Are Protestable.

Is a county warrant, that is, a warrant drawn by the chairman of the county commissioners on the county treasurer, subject to protest?

I do not think so. A county warrant is a voucher for the treasurer rather than a negotiable instrument. Quoting from Daniel on Negotiable Instruments, § 427:

"Frequently a draft, order, or warrant is drawn by one officer of a municipal corporation upon another; or by the selectmen of a town, or supervisors of a county, upon an officer, for the payment of corporate indebtedness to the payee. The intention in such case is, as a general rule, to furnish vouchers to the proper

disbursing officer, and not to put negotiable instruments in circulation. And it has been generally, and as we think justly, considered that such drafts, orders, or warrants are not negotiable instruments, and cannot be regarded either as bills of exchange or promissory notes, cutting out equities as against the corporation—on the ground that there is no implied authority in such officers to execute negotiable instruments."

The author cites a large number of cases in support of the text, among them a case from the Supreme Court of the United States, where it was said with reference to county warrants:

"The warrants being in form negotiable are transferable by delivery, so far as to authorize the holder to demand payment of them, and to maintain, in his own name, an action upon them. But they are not negotiable instruments in the sense of the law merchant, so that when held by *bona fide* purchasers, evidence of their invalidity or defenses available against the original payee would be excluded. The transferee takes them subject to all legal and equitable defenses which existed to them in the hands of such payee." *Wall v. County of Monroe*, 103 U. S. 77, 26 L. Ed. 430.

A good deal of confusion seems to exist in the minds of bankers as to what papers are protestable under our Georgia statute. Under the law merchant, drawers and indorsers of both inland and foreign bills of exchange were entitled to notice of dishonor. Protest was permissible on inland bills and required on foreign bills. Afterwards it became customary to give notice of dishonor and to protest promissory notes. In 1826 the practices originating under the law merchant were abolished by statute in this State as to all instruments except promissory notes given for the purpose of negotiation or intended to be negotiated or left for collection at a chartered bank. *Act of 1826, Cobb's Digest 594.*

The Code of 1863 modified the statute to some extent, the rule there established being:

"When bills of exchange and promissory notes are made for the purpose of negotiation, or intended to be negotiated at any chartered bank, and the same are not paid at maturity, notice of the nonpayment thereof, and of the protest of the same for non-payment, or nonacceptance, must be given to the indorsers thereon within a reasonable time, either personally or by post, (if the residence of the indorser be known,) or the indorser will not be held liable thereon; but in no other case, and upon no other bills or notes, shall notice or protest be held necessary to charge the indorser." *Code of 1863, § 2731.*

The law stood thus until 1876, when the section was amended by adding the following:

"That it shall not be necessary to protest as now required by law in order to bind indorsers except in the following cases, to wit, 1st, when a paper is made payable on its face at a bank or banker's office; 2d, when it is discounted at a bank or banker's office; 3d, when it is left at a bank or banker's office for collection—and in all such cases days of grace shall be allowed." Ga. Laws 1876, p. 18, § 4.

This is the law as now contained in the Code (Park's Ann. Code, § 4280), except that "days of grace" have been abolished.

It will readily be seen, therefore, that the law only provides for protest in case of bills of exchange and promissory notes which are made "for the purpose of negotiation or intended to be negotiated at any chartered bank," and that even in the case of these instruments protest is not required unless the paper is payable on its face at a bank or banker's office or when it is discounted at a bank or banker's office or when it is left at a bank or banker's office for collection. In other words, the paper must have been made for the purpose of being negotiated at a bank and must have been actually so negotiated or left for collection. Banks generally are under the impression that any paper which is discounted at a bank or left at a bank for collection is protestable, but as will be seen this is not the case unless the paper was intended to be negotiated at a bank.

The Supreme Court has in a number of cases held that the indorsers and drawers of domestic bills of exchange, as well as the makers and indorsers of notes, are not entitled to protest and notice where the papers were not made payable at a bank or made for the purpose of negotiation or intended to be negotiated at a chartered bank. I quote from one or two of these cases.

"In a suit against the drawers of a domestic bill of exchange, not made for the purpose of negotiation, nor intended to be negotiated, at any chartered bank, it is unnecessary to show protest for nonpayment, and notice thereof." *Pannell v. Phillips*, 55 Ga. 618.

In discussing this case it was said:

"These two drafts were domestic inland bills of exchange, drawn in this State upon parties in this State, and payable here, and were not payable at any chartered bank, and were not made for the purpose of negotiation nor intended to be negotiated, as appears on the face thereof, at any chartered bank. Since the passage of the Act of 1826, Code, § 2781, notice of the nonacceptance or of the nonpayment of this class of paper, has not been required in this State to charge the indorser or drawer." *Pannell v. Phillips*, 55 Ga. 619.

"Notice that the acceptor has failed to pay is not necessary to charge the drawer of a domestic bill of exchange in this State, the draft or bill not being intended to be negotiated at any chartered bank." *High v. Cox*, 55 Ga. 662.

"Where there is nothing upon the face of a bill of exchange to show that it was intended for negotiation at a chartered bank, the defendant—the drawer—cannot show by parol evidence that such was the intention in a suit against him by the holder." *McLaren v. Marine Bank*, 52 Ga. 131.

In this case the paper was actually held by a bank.

"Where a draft was not negotiable or payable at any chartered bank, notice of nonpayment was not necessary to charge the drawers or indorsers thereof." *Williams v. Lewis*, 69 Ga. 825.

The whole subject is reviewed by Judge Cobb in *Bank of Richland v. Nicholson*, 120 Ga. 622, in which it is held that since the Act of 1826 notice is only necessary in the case of technical indorsers, and not even the drawer of a domestic bill of exchange, though discounted at a bank, is entitled to notice of dishonor.

A county warrant not being a negotiable instrument, and certainly not being intended to be negotiated or being made for the purpose of negotiation at a chartered bank, is not such an instrument as to require protest.

Protest Is Required Where Payment of Check Is Stopped.

Where the drawer of a check stops payment on it should the check be protested?

A check is usually regarded as, substantially, a bill of exchange, and while it has been held in some of the States that protest of a check is not required, most of the courts hold that a check is protestable. Protest is not required to bind the drawer of a check where he has no funds on deposit with the bank on which the check is drawn, nor where he stops payment of a check, but is required to bind the indorsers. An indorser is not supposed to know the state of the drawer's account, and where payment is refused for lack of funds, or where the drawer stops payment, the indorser is entitled to formal presentment, protest and notice. I quote from Daniel on Negotiable Instruments, § 1600:

"While checks have not all the incidents of bills of exchange, they may be yet included in that term when applied to the steps to be taken in case of dishonor. The same reasons that would au-

thorize the protest of an inland bill of exchange for nonpayment, would authorize the protest of a check, the payment of which had been refused on presentment. And, therefore, where a statute provides for a protest of inland bills and promissory notes [as it does in Georgia, Code, § 4280], a check would be embraced within the description of paper denominated inland bills of exchange, and might be protested in like manner. And if drawn in one State upon another, a protest would doubtless be necessary in order to charge an indorser, the check being in that event a species of foreign bill."

With regard to the necessity for presenting a check for payment, this author says, § 1596:

"There may, however, exist sufficient excuse, on the part of the holder, for delay or failure in making presentment or giving notice. Thus if the drawer had no funds in the bank at the time of drawing the check, or subsequently withdrew them, he commits a fraud upon the payee, and can suffer no loss or damage from the holder's delay or failure in respect to presentment and notice. He is, therefore, liable without presentment or notice, and may be sued immediately. * * * The indorser of a check stands upon a different footing from that of the drawer. He cannot be presumed to know, as the drawer must know, the state of the latter's account with the bank; and, although the drawer without funds will be absolutely bound, the indorser of his check will not be so bound, unless it be affirmatively shown that he knew the fact that there were no funds to meet it, and thus participates in the wrong committed upon the holder."

Certificate of Deposit Not Protestable.

Is a certificate of deposit payable at a fixed date and indorsed by one or more parties subject to protest? Would failure to protest release an indorser?

As pointed out in a preceding opinion, protest is required only of bills of exchange and promissory notes made for the purpose of negotiation or intended to be negotiated at a chartered bank. An ordinary certificate of deposit would hardly come under the terms of the statute. It is not a bill of exchange, nor is it a promissory note in the ordinary sense of the term, and it is doubtful whether it could be said to be made for the purpose of negotiation, or intended to be negotiated, at a chartered bank. I do not think, therefore, that protest is required on such certificates or that an indorser would be relieved by failure to protest.

Papers Are Protestable Regardless of Amount.

Is a draft for less than \$10 subject to protest?

The amount of the paper has nothing to do with its protestable character. A bank would be required to protest a paper, whether it is for \$1.00 or for many thousands of dollars, where it is protestable and protest is not waived in some way. It is quite usual with some of the banks to instruct their correspondents not to protest items under \$10.00; but in absence of instructions, a bank would be liable in the event of failure to protest a small paper just as it would be if the paper were larger.

Protestable Paper Held as Collateral Security Maturing Before Principal Obligation Should Be Protested.

Is it the duty of a bank to protest a note left with it as collateral security, the note falling due before the borrower's obligation matures?

Assuming the paper to be protestable under the rules already discussed, it would be the duty of the bank to protest, if it were necessary to do so in order to bind an indorser. A bank should protest a paper held as collateral just as though it had been left with it for collection, or had been discounted by it.

Check Not Indorsed by Payee Is Not Protestable.

Is a check which has not been endorsed by the payee, but has several other indorsements, protestable?

I have not been able to find the question decided directly, but it seems on principle there can be no doubt that protest is not required. Protest and notice are only required where a paper has been presented for payment or acceptance, as the case may be, and has been dishonored. Its purpose is to furnish a convenient method of proving the fact that such presentment has been made and that the paper has been dishonored. Payment cannot be demanded of a check payable to order except upon the indorsement of the payee. The refusal to pay a check without such indorsement is not a dishonor, and as the check has not been dishonored it cannot properly be protested.

Protest is made where a paper is dishonored and notice is given of such dishonor in order to bind persons secondarily liable on

the paper. The contract of these parties, the drawer and indorsers, is to pay provided the paper upon presentation thereof to the person primarily liable is dishonored. If called on to respond under this contract, where a paper payable to order is presented without the indorsement of the payee, they could very readily respond that the paper had not been dishonored because its direction was to pay to the order of a named person, and the order of this person (that is, his indorsement) had not been secured.

The Court of Appeals of Alabama, in the case of *Harden v. Birmingham Trust & Savings Bank*, 55 Sou. 943, said:

"In order to fix a liability as for breach of duty on a bank for a failure to pay a check of a depositor drawn in favor of another person, it must appear that the check was presented at the proper time and place and properly indorsed by the payee; and if it has been transferred by the payee to another, then it should be indorsed by such other person also."

As proper presentation of a check cannot be made until it is indorsed, protest, which is simply a memorial of the fact that presentment has been made and payment refused, is not required.

Where Check Is Indorsed by Agent Whose Authority Is Not Shown, Protest Is Authorized.

A check payable to W. C. H. is endorsed W. C. H. per I. B. B. It is cashed and sent forward through several correspondent banks, all of which indorse it and guarantee prior indorsements. It is finally presented to the drawee bank, which bank declines payment because the indorsement is unauthorized. The bank presenting it for payment has the check protested. Was the drawee bank justified in declining payment on account of the alleged unauthorized indorsement? Should the check have been protested by direction of the bank presenting it?

A bank always has right to decline payment until the person presenting the check is properly identified, and in case of indorsements to decline payment unless it is satisfied of the genuineness of these indorsements. This is true because a bank can only pay the funds of a depositor to the person to whom the depositor directs payment.

Therefore, the drawee bank in the case stated was within its rights when it declined payment on the indorsement of an agent, the agency not being established.

Whether or not the drawee bank having declined payment, the checks should have been protested, depends upon the following considerations:

The indorser of commercial paper guarantees that the paper is a valid obligation in every respect. He warrants the genuineness of all of the signatures to the paper, and in addition to these warranties he also warrants that the paper will be paid, or accepted, as the case may be, when it is properly presented for that purpose. This last warranty, however, the warranty of payment or acceptance, cannot be enforced unless a demand is proved and proper notice given, and the way to establish such demand and notice is by formal protest by a notary public. The indorser is liable on his indorsement, so far as the implied warranty of genuineness is concerned without protest. Where, therefore, the paper is not genuine or where it has been transferred on a forged indorsement, the indorser may be sued immediately on his implied warranty without presenting the paper or protesting it. But if the paper is genuine and the indorsements are all genuine and authorized, in order to hold the indorser on his implied warranty that the paper will be paid on presentation it must be formally presented and protested.

Applying these rules to the facts of the case stated: If the indorsement which has been rejected by the drawee bank is in fact unauthorized, then protest is not necessary in order to bind the several banks which, by their indorsements, have guaranteed the genuineness and authenticity of this indorsement. But if, on the other hand, it should develop that the indorsement was authorized, then the banks would not be liable on their warranty of the genuineness of the indorsement, for the reason that the indorsement being genuine there has been no breach of their warranty. But, the paper having been presented to the drawee bank and payment having been refused, if it is desired to hold the several indorsers on their implied warranty that the check would be paid when presented protest would be necessary. As the bank presenting the check for payment would not care to take the risk of determining whether or not the indorsements were authorized, it was entitled to protect itself in any event by protesting the check.

Protest of a Forged Check Not Required, but Should Be Made as Check May Be Genuine.

Is it the duty of a bank to protest a forged check?

An indorser being liable on his warranty of the genuineness of the paper, whether it is formally presented and protested and

notice given or not, protest of a forged check is not necessary. But as the indorser is not liable on a genuine paper unless it is protested and notice is given, the safe rule, even when the bank is satisfied that the paper is a forgery, would be to protest it. In such a case no possible harm could come of the protest, and the bank would be relieved of all responsibility of deciding whether the paper is, in fact, a forgery. A few of the courts have held that notice should be given even in the case of a forged paper, and even if not required, this is certainly safer.

When Payment Refused Because Signature Does Not Correspond with Authorized Signature, Safer to Protest.

Where a check is returned because the signature does not correspond with the authorized signature given to the bank by the depositor, should the check be protested?

It is the duty of a bank for the protection of its customers, as well as for its own protection, to decline to pay a check unless the signature corresponds with the one filed with the bank, unless it knows the check is genuine. The bank can not safely determine whether a signature is genuine except by comparison with the authorized signature, and should it pay on an unauthorized signature it would take the risk of doing so. To relieve the bank of the responsibility of deciding whether the paper was a forgery, it would be best to protest. The danger of protest is so slight as compared with the risk of not protesting that prudence would seem to require protesting ~~in~~ all cases of doubt. In the case mentioned, I do not see how there could be any possible liability on the bank or the notary for making the protest. The drawer of the check could not complain at its protest, because the failure to pay was directly for his benefit and protection, and no other party to the paper would be injuriously affected by the protest. I think, therefore, that the safe rule would be, in cases of this character, to protest and to notify the indorsers.

Unsigned Checks Not Protestable.

Is a check without signature protestable?

A check cannot be protested unless payment can properly be demanded. Manifestly, payment of a check which has not been

signed cannot be demanded, and such a check therefore would not be protestable.

Voucher Check With Receipt Attached When Receipt Is Not Signed as Required, Not Protestable.

Is a voucher check, stating on its face that it becomes a check on a named bank when properly receipted, protestable for nonpayment, when it is presented to the bank for payment without being receipted in the place provided for that purpose, though it is indorsed on the back? Is a bank protesting such a check liable in damages for so doing?

The question does not seem to have been decided by the courts. I am of the opinion, however, that the paper is not protestable. Until the receipt is signed, the paper is incomplete. It becomes a check only when it is receipted. Until the receipt is signed, it is no more entitled to payment than is any other incomplete check. To illustrate: If a check should be drawn without specifying the amount or the bank on which it was drawn, or if the drawer should fail to sign it, a bank would not be authorized to pay such a check. No presentment for payment could legally be made, and as protest is simply for the purpose of furnishing evidence that the paper has been properly presented for payment and payment has been refused, such a paper could not be protested. So, in the case of the voucher check in question, until it is receipted it is not a check. Therefore, payment can not be legally demanded, and as payment can not be demanded, there is no basis for protest.

Again, a check is in the nature of an order on a bank to pay a certain sum purporting to be on deposit, and there would seem to be no reason why the drawer could not direct the bank to pay only when a receipt was signed. There seems to be no reason why, in giving direction to the bank, a drawer can not make any reasonable addition to the mere order of payment. If the person to whom the check is delivered is not willing to accept it with such direction, he can reject it; but if he accepts it, payable only when a receipt is signed, or with any other direction to the bank indorsed thereon, he can not insist that the bank on which it is drawn must disregard this direction given to it by its depositor on the face of the paper. And certainly it would seem that the bank would have no authority to pay except in accordance with the direction of its depositor. Unless the bank is required to pay the check when presented, presentment to be the basis of protest cannot be made, and, therefore, protest would not be authorized.

To illustrate again: A check payable to the order of a

named person cannot be legally presented for payment until indorsed by the payee, and until so indorsed it is not subject to protest. The drawer directs the bank to pay to the order of the payee. This order is given by indorsement. The bank has no right to pay until the indorsement is made. So, in the present case, the drawer directs the bank to pay upon the receipt of the payee. Until the receipt is signed, the bank would seem to have no right to pay.

As already stated, unless payment can be legally demanded, a check is not subject to protest, and where the holder of a check unlawfully causes a protest of it to be made and notice to be given to the drawer and indorsers without presentation for payment, according to its terms, a cause of action is furnished to the drawer, who may recover damages against the holder for such unlawful protest.

Paper Stamped "No Protest," but Billed as Protestable, Should Be Protested.

Is a draft subject to protest when "no protest" is stamped plainly across the face, but which is billed as protestable?

The only safe rule in regard to protest is,—when in doubt, protest. There is so little risk in protesting as compared with the risk of not protesting that a bank can never afford to take the risk where there is any doubt on the question.

A bank would be authorized to act on the instructions of its correspondents and protest or not, regardless of whether the paper were otherwise protestable. There are sometimes reasons why a bank wishes a paper protested, although protest may have been waived. Usually an entry on the face of a draft of "No Protest" would be taken as sufficient authority not to protest. If this was on the draft when it was originally given it would be treated as a waiver of protest by the original parties and any subsequent indorser, but even in such case a forwarding bank might wish the paper protested and the collecting bank should act on its instructions. If a draft was stamped "No Protest" after it had been signed and put in circulation, this stamp would not render the paper nonprotestable as against any one who signed it previously to the entry, and if not protested prior indorsers would be discharged.

Bank Not Liable for Failure to Protest When "No Protest" Slip Attached, Though Paper Sent Protestable.

Is a bank liable for not protesting a draft received in a collection letter indicating that it is protestable, but to which is attached a slip marked "no protest, take this off before presenting"?

The bank would be justified in acting on the slip attached to the draft, and if it failed to protest would not be liable for such failure, although loss may have resulted. But, as stated in the preceding opinion, the draft having been sent protestable, the bank would be authorized to protest in spite of the "No Protest" slip, and it would be safer generally to do so.

Where "No Protest" Slip Detached, Draft Becomes Protestable.

A draft has attached to it a perforated slip bearing the words, "no protest." Can the draft be made protestable by tearing off this slip?

Any holder of a draft has the right to insist on protest, even though the draft be drawn on a blank having the words, "no protest," attached by a perforated slip. Any holder can make such a draft protestable by tearing off the slip. Certainly if a bank received the draft without such slip attached and with protest not waived in any way, it would be its duty to protest.

Sureties Not Relieved by Failure to Protest.

Is it necessary to protest a note in order to bind accommodation indorsers or sureties?

Protest is only necessary to bind technical indorsers. Whenever an indorsement is necessary in order to transfer the title, the paper must be protested and the indorser notified. This is true regardless of whether the indorsement is for value or merely for accommodation. Protest is not necessary in order to bind sureties, whether the surety signs on the face of the paper as surety or writes his name upon the back as an accommodation indorser, his indorsement not being necessary to transfer the title to the paper.

Bank Is Liable for Failure to Protest a Protestable Paper as Instructed.

A draft payable to a bank was deposited for collection. The bank sent the draft direct to the bank upon which it was drawn. The draft was sent subject to protest, but was returned unprotested. It was sent back with instructions to protest, and was again returned unprotested. Can the forwarding bank make the bank on which the draft was drawn pay it, because of the failure to protest?

Where a protestable paper is sent to a bank for collection with instructions to protest, and the bank fails to protest in accordance with these instructions, and an indorser is released by such failure, and loss results therefrom, the bank would be liable.

But from the facts stated, I do not see why it was necessary to protest this draft. Protest is only necessary in order to bind technical indorsers on a paper. There were no indorsers on this paper to be bound, and, therefore, protest was not necessary. If the draft was made payable to the first bank and it forwarded it to the drawee, and the draft did not pass through the hands of anybody else, there necessarily could have been no indorsers on the paper to bind whom protest was necessary.

The only object of protest and notice is to preserve the liability of indorsers, and, of course, if there are no indorsers it is entirely immaterial whether or not a paper is protested.

A Paper Presented After Maturity Is Not Protestable.

A protestable paper is forwarded to a bank for collection after its maturity. It is presented to the maker and payment refused. Is it protestable under these circumstances?

I do not think so. In order to hold indorsers on a note payable on a fixed day, the note must be presented for payment on the day on which it matures. A presentment before or after this day is not sufficient.

I quote from two or three recognized authorities:

"In respect to the drawer of a bill and the indorser of a bill or note, it is essential to the fixing of their liability that the presentment should be made on the day of maturity, provided it is within the power of the holder to make it. If the presentment be made before the bill or note is due, it is entirely premature and nugatory, and, so far as it affects the drawer or indorser, a perfect nullity. And if it be made after the day of maturity, it can, as matter of course, be of no effect, as the drawer or indorser will already have been discharged, unless there were sufficient legal excuse for the delay." Daniel on Negotiable Instruments, § 598.

"In order to hold the drawer and indorsers, it is necessary to present the paper for payment on the day of maturity. And presentment before or after the day of maturity will not be sufficient, unless the holder has some valid excuse for not making the presentment on the exact day of maturity." Tiedeman on Commercial Paper, § 315.

And, says the author last quoted:

"If the paper is sent to an agent for collection, or transferred for consideration, so near to the day of maturity, that it is impossible to present for payment on the day of maturity, the presentment and notice will be excused, at least as to the indorser who had caused the delay. But it will be no excuse as to the prior indorsers, who had not necessitated the delay." § 361.

Protest is intended to furnish to the holder legal evidence of the fact that the required presentment and demand for payment has been made and notice of dishonor given, in order that this evidence may be used in an action brought on the paper against the drawer and indorsers.

Wherever presentment for any reason cannot be made at the time or place required, protest cannot lawfully be made, for the protest, as above stated, is only for the purpose of furnishing evidence of the fact that presentment and demand for payment has been made.

At the time the paper in question reached the collecting bank it was already past due. Presentment not having been made to the maker on the day of maturity, the indorsers were already discharged. Presentment was not necessary in order to bind the maker of the note, or the indorser whose delay caused the failure to present on the day of maturity. Therefore, presentment after maturity had no effect so far as the liability of any of the persons on the paper was concerned, and protest was for that reason unnecessary.

A Check May Be Protested Immediately Upon Presentment and Refusal of Payment.

Where a check is presented to a bank through a clearing house or by another bank at a clearing, is it protestable as soon as payment is refused, even though a deposit sufficient to cover the check be subsequently made on same day before closing hour?

A check being drawn presumably against funds on deposit is protestable as soon as presented and payment refused. However, before it could be protested, it would have to be presented by a

notary public and payment demanded by him. Presentation through a clearing house or by another bank at a clearing is not such a presentation and demand for payment as would authorize protest. The rule that the acceptor of a bill of exchange or the maker of a note may make payment at any time during business hours of the day on which the paper is due does not seem to apply to a check for the reason that a check is drawn against a fund presumably in bank at the time it is given, and therefore, whenever payment is formally demanded by a notary public the check may be protested. As to the propriety of protesting a check before the bank closes on the day in which it is presented, the bank holding the check would, of course, have to judge. It would seem where a deposit is made on the day that the check is presented, that the check should not be protested. This, however, is a mere matter of policy.

Date of Original Maturity of Paper Is Proper Time for Presentation and Protest Rather Than Extended Due Date, Unless Agreed to by All Parties.

Where there is an extension of the time of payment of a note, is the date of the expiration of the extension or the date of the original maturity the proper time for protest? The particular case is this: A note is sent for collection, and on the day it falls due the forwarding bank wires the collecting bank to extend payment for a week. This is done. At the expiration of the week's extension, the maker defaults. The question is whether the note should be protested then.

The rule is that paper must be presented for payment on the date of its maturity.

Of course, if all the parties liable on a note agree with the holder on an extension for a definite time, this extension would become the day of the maturity, taking the place of the original due day, and in such event the paper should be presented for payment on the new due date rather than on the original date. If not paid then, it could, of course, be protested. But I do not understand that any such extension as this had been agreed on in the case mentioned. It appears simply that the forwarding bank wired its correspondent to hold the paper for a week. If this was all, and the indorsers did not agree to such an extension, the paper could not be legally protested at the end of the extension, since then the indorsers would already be discharged.

Not Necessary to Protest Draft a Second Time on Second Presentation.

Should a draft be protested a second time upon a second presentation?

There is no reason for a second protest and no law authorizing it. Protest is for the purpose of furnishing ready proof of the presentation of a negotiable instrument and refusal to accept or to pay, as the case may be. It was formerly confined entirely to foreign bills of exchange, and was allowed because of the exceeding difficulty of proving the presentation and refusal to pay in cases of this character.

Where a paper has once been formally presented by a notary public and protested for nonacceptance or nonpayment, and the indorsers properly notified that acceptance or payment has been refused, they are bound on the paper. They would not be any more bound by any number of subsequent presentations; and as protest is for the purpose of notifying the indorsers and, therefore, holding them liable, it would seem to be entirely useless to protest and notify more than once.

Where Place of Payment Not Stated, Note Must Be Presented to Maker in Person or at His Office or Residence.

If a note is not made payable at any specified place, where must it be presented for payment in order to protest if not paid?

It would be necessary for the notary to present the note either to the maker in person or at his place of business, if he has any, if not, at his residence.

Presentment at Office During Business Hours Sufficient, Though Payee Is Out.

If a draft is presented at the office of the payee and he is out, is this a sufficient presentment to authorize protest?

A bill of exchange, note or draft, which is not payable on its face at a particular place, should be presented for payment at the office of the payee during business hours, and when so presented by a notary, should be protested regardless of whether the payee happens to be in his office at the time presentment is made.

Sight Draft Can Be Presented at Place of Payment or at Drawee's Office, Though He Is Out of Town, and Protested.

Is a sight draft protestable if the person on whom it is drawn is out of town?

An ordinary draft is a domestic bill of exchange, and where negotiated through a bank, under the terms of the Code section quoted in a previous opinion, it would be protestable in order to bind the indorsers. The fact that it is payable at sight instead of at a given time does not prevent it from being a protestable paper. If the paper on its face is payable at a particular place, it should be presented at that place. If not, it should be presented at the business office of the drawee if he has a regular business office, and if not, at his residence. It makes no difference whether it is presented to the drawee in person or not, if it is presented at the place of payment named in the bill or at the business office or residence, if no business office is maintained. The fact that the drawee may be out of town, and, therefore, that it may be impossible to present to him in person, would not prevent the bill from being protestable or relieve the bank of the duty of making protest when the bill is properly presented at the place of payment or place of business or residence, as above stated.

Where Check Drawn on Branch Bank, Presentment at Parent Bank Unauthorized.

Where a check is drawn on a branch bank and presented for payment to the parent bank, or vice versa, can it be protested without presentation to the one on which it is drawn?

If the parent bank and the branch are conducted separately, each having its own customers, the accounts of the two being kept entirely separate, and the two banks being located in different buildings, I do not think there would be any obligation on the officers of the bank to present a check drawn on the parent bank to the branch for payment or to present a check drawn on the branch to the parent bank. A check could properly be protested where drawn on either bank and the drawer had no funds in that bank with which to meet it, though he might have funds in the other bank.

This, however depends somewhat on custom, and the way in which the two institutions are conducted. If it has been custom-

ary to present or pay checks at either the parent or branch, regardless of whether they were drawn on the parent or branch, or if the branch is a mere agency and not conducted separately and as a distinct institution, I do not think the bank would be authorized to refuse payment where either the parent bank or branch carried the account of the depositor.

Notice of Dishonor Must Be Mailed to Indorser on the Next Day.

Has the notary twenty-four hours in which to mail the notice of protest?

The statute provides that "notice of nonpayment or nonacceptance must be given to the indorsers within a reasonable time either personally or by post."

What is a reasonable time is generally a question of fact depending on the circumstances. The Supreme Court seems never to have directly decided whether a notary has the day succeeding the day of protest in which to mail the notice, but in the case of *Apple v. Lesser*, 93 Ga. 751, it quotes from Daniel on Negotiable Instruments explaining what is a reasonable time as follows: "The notice should be deposited in the post in time to be sent by the mail of the day after dishonor, provided, such mail is not closed before early and convenient business hours of that day, in which case it must be sent by the next mail thereafter." The rule as laid down here is the one generally adopted.

Notary Public Who Is a Stockholder in a Bank Is Not Disqualified to Protest Papers for the Bank.

Can the cashier of a bank who is a stockholder thereof and who is a notary public legally protest papers for the bank?

The Supreme Court has decided the precise question in the case of *Patton v. Bank of Lafayette*, 124 Ga. 965, 973, from which I quote:

"The fact that the notary was a stockholder in the bank and had an indirect pecuniary interest in the note, did not render him incompetent to protest it for nonpayment."

Notary Public Not Entitled to Fee Where Paper Presented Before Due.

Is a notary public entitled to a fee for protesting a draft which is drawn at three days' sight, is presented on the date of its receipt, protested, and returned to the forwarding bank?

A paper drawn payable at so many days' sight is not due until the required number of days after it is presented. It could, therefore, not be protested for nonpayment until the number of days required had expired. Any protest before the expiration of the time would be premature, and the notary would not be entitled to his fee.

I understand from the question that the paper was not presented for acceptance and protested for nonacceptance, but was presented for payment and protested for nonpayment. If the party on whom the paper was drawn refused to accept it, the notary would have been authorized to protest for nonacceptance; but if the paper was presented for payment before the expiration of the three days after sight, the paper not being payable at that time, protest would be premature, and the notary would not be entitled to his fee.

Protest Fees on Check May on Payment of Check Be Charged to Drawer's Account.

When a payee bank protests a check for insufficient funds and later the drawer deposits sufficient funds and the check is returned to the bank with instructions to collect the amount of the check plus the protest fees, is it proper to charge the check with protest fees, to the drawer's account without further instructions from him?

So far as I know, the question here presented has never been passed upon by our courts. There can be no question of the right of the bank to charge a check which had been turned down for lack of funds, to the account of the depositor, when his deposit is sufficient, without any express authority from the depositor. If the check had been held out for a considerable period, just how long it would be impossible to say, it might be regarded as a stale check, and the bank paying it without authority would take the risk of the drawer having already settled with or paid the payee. The fact that the check had been protested and held for a considerable period might strengthen this presumption. But if no considerable time had elapsed between the first presentment of the check and the second, there would be no question of the

bank's right to charge the check to the depositor's account without any instructions.

I am also of the opinion that it would have the right to charge the amount of the protest fees, treating them as a part of the check. The drawer of the check would unquestionably be liable for these fees and I do not think he would be in position to question the authority of the bank to include them as a part of the check, though I confess there is some doubt on the question. A check is a direct order from the depositor to the bank to pay a definite amount. There is no such order for payment of the protest fees, and it might be that such payment would be treated as unauthorized.

However, if I were an officer of the bank and such check was presented the second time, I would pay it, charging the check and the protest fees to the depositor unless, as above indicated, the check had been held out for considerable time.

Bank Having Check Protested When Payment Has Not Been Refused Liable for Protest Fees as Well as for Damages.

A check for \$26.06 is presented to the drawee bank through another bank, which insists on the payment of \$26.09. The check is returned by the drawee with statement indorsed on it that it is only for \$26.06. Is the check subject to protest, and if not, who is liable for protest fees?

There is scarcely any doubt that the check should not have been protested. The drawee bank could only pay the amount of the check and was justified in refusing to pay anything more than that amount. If the bank presenting the check refused to accept the amount called for by the check, insisting on a larger amount, then there was no refusal to pay the amount called for by the check, and until there has been a demand and refusal a check is not protestable.

As the presenting bank caused the check to be protested without authority, it is liable for the protest fees of the notary public, and it may be added that if any damage resulted from the wrongful protest of the check, the bank causing the protest would be liable for this damage also.

Protest May Be Waived in Face of Paper.

Is a clause in a note waiving protest and notice legal and valid?

Protest may be waived; and where a note on its face contains a waiver of protest, protest is not necessary in order to bind indorsers. The rule is clearly stated as follows in Tiedeman on Commercial Paper, § 363, p. 626:

"If the waiver is put in the body of the instrument, it enters into and forms a part of the contract of every one who signs his name to the paper, whether as drawer or indorser."

Maker Can Not Waive Protest After Paper Has Been Negotiated.

Has the maker of a negotiable instrument at the maturity thereof the right to waive protest?

Nothing that the maker can do after the paper has been indorsed can bind the indorsers. To have the paper protested under the circumstances prescribed by the Code is a right of the indorser, which, of course, the maker can not waive. Protest can be waived in the face of a paper, and where a waiver of this kind is included, protest would not be necessary. After the paper is complete and has actually been negotiated, the maker can not waive any right of the indorsers.

Waiver of Demand Is Equivalent to Waiver of Protest.

Does a waiver of demand for payment upon a promissory note negotiated at a chartered bank constitute a waiver of protest?

The Supreme Court of Georgia has held that a written waiver of "demand and notice" on the part of an indorser is in effect a waiver of demand and refusal and protest therefor. *National Exchange Bank v. Kimball*, 66 Ga. 753.

The court has also held that where a draft waived protest, this included a waiver of notice, *Williams v. Lewis*, 69 Ga. 825; and that the same facts which dispense with notice of dishonor or excuse the holder from giving notice will render protest unnecessary, *Hull v. Myers*, 90 Ga. 674. While these cases do not expressly hold that a waiver of demand also waives protest, they practically decide the question.

On principle, it seems that a waiver of demand is necessarily equivalent to the waiver of protest. The purpose of protest and notice by a notary is to furnish to the holder legal evidence of the fact that presentment and demand for payment has been made. Formerly, protest was not required except in case of foreign bills of exchange, and it was required there as furnishing an easy and cheap method of proving the fact that the bill had been properly presented and that a demand for payment had been made.

If the demand for payment is waived, there would seem to be no basis for a protest, nor indeed would a notary be authorized to protest except in case of making formal presentment and demand for payment. If no protest is made, of course no notice could be given; hence it seems that a waiver of demand is equivalent to waiving protest, which is merely evidence of a demand and that protest for nonpayment has been made, and this would come under the reasoning of the case of *Hull v. Myers* above referred to, as being a fact which would excuse or dispense with the giving of the notice and therefore render protest unnecessary.

Where Protest Waived, Bank Not Liable for Not Protesting, Though Paper Sent with Instructions to Protest.

Where a waiver of protest is contained in a note, but the forwarding bank instructs the collecting bank to protest, does failure to protest relieve the indorsers? Is the collecting bank liable for failure to protest?

Protest may be waived, and where a note on its face contains a waiver of protest,—especially where it states that protest is waived not only by the maker, but by indorsers as well,—protest is not necessary in order to bind indorsers. Protest not being necessary in order to bind, of course, the indorsers would not be relieved by the failure to protest.

I do not think a bank could be held liable for failure to protest a note which is not protestable or one which it is not necessary to protest in order to bind indorsers. The theory on which a bank would be liable for failure to protest is that it has neglected to do something by reason of which loss has resulted. As no loss could result from the failure to protest a paper where protest has been waived, the bank could not be held liable for failure to carry out instructions. I think, however, that it would be entirely proper for the bank to obey instructions and protest, even though protest was waived.

Waiver of Protest Is Not Affected by Bankruptcy of One of the Parties.

When protest is waived, and one of the parties to the note goes into bankruptcy, is it necessary to protest the note?

It is not necessary to protest a note where the protest is waived. Nor is it generally necessary in such cases to formally present the paper at the place of payment; that is to say, the indorsers would not be discharged for failure to make such presentment. The bankruptcy of one of the parties does not change the rule.

REDISCOUNT.**Bank's Statement Must Show Rediscounts.**

Is there any way in which a small bank can indorse a customer's note and hold the collateral and receive the proceeds from the rediscount for the customer's credit, and not report the same as a rediscount?

I do not see how this can be done. If the bank rediscounts the paper under its indorsement, this creates a liability against it as indorser, and is a technical rediscount which ought to appear in the bank's statement.

RENT.**Landlord's Lien for Rent (Except on Crops) Ranks with Other Liens from the Levy of Distress Warrant.**

Is a judgment against a tenant superior to the landlord's claim for rent?

A judgment is superior to a claim for rent (except upon the crop made on the rented lands), unless a distress warrant has been issued and levied. A landlord's general lien for rent ranks with other liens from the levy of a distress warrant. The special lien on crops is superior to judgments and all other liens except taxes. I quote the sections of the Code governing the matter:

"Landlords shall have a special lien for rent on crops made on land rented from them, superior to all other liens except liens for taxes, to which they shall be inferior, and shall also have a general lien on the property of the debtor, liable to levy and sale, and such general lien shall date from the time of the levy of a distress warrant to enforce the same.

"Such general lien of landlords shall be inferior to liens for taxes and the general and special lien of laborers, but shall rank with other liens, and with each other according to date, the date being from the time of levying a distress warrant. The special liens of landlords for rent shall date from the maturity of the crops on the lands rented, unless otherwise agreed on, but shall not be enforced by distress warrant until said rent is due, unless the tenant is removing his property, or when other legal process is being enforced against said crops, when the landlord may, as provided elsewhere in this Code, enforce said liens, both general and special." Park's Ann. Code, §§ 3340, 3341.

Transfer of Landlord's Lien for Rent Does Not Have to Be Recorded.

Where a landlord's lien is transferred should it be recorded?

There is no provision in our statute for recording a landlord's lien, whether it is the general lien given the landlord on all the property of his tenant or the special lien on the crops raised on the rented premises; nor is there any provision requiring the recording of the lien given to the landlord for supplies furnished to tenants to make crops. Of course, a mortgage given on a crop would have to be recorded as any other mortgage. All of these liens are subject to transfer, but there is nothing requiring the transferred lien to be recorded, except in case of a mortgage.

SAFETY DEPOSIT BOXES.

Bank Renting Deposit Boxes Liable for Ordinary Care.

Is a bank renting safety deposit boxes to its customers liable for the theft of money or securities deposited therein?

While a general deposit creates merely the relation of debtor and creditor, a special deposit renders the bank liable as depositary or bailee, the liability being the same as that of a warehouseman. If the deposit is gratuitous, the bank is liable only for gross neglect, but where a consideration is paid for the use of the safety deposit box, the bank is bound to exercise ordinary care and diligence in protecting the property deposited therein. Ordinary care and diligence is that care which an ordinarily prudent man exercises under the same circumstances in his own in-

terest or for the protection of his own property. What is ordinary care and diligence in any particular instance depends upon the circumstances and conditions under which the deposit is made and the representation made by the depositary. In case of a loss by theft, the burden is on the bank to show that it exercised ordinary care and diligence; and if it can show this, it is not liable.

Ordinarily, a bank would not be liable for a burglary where its safety deposit boxes are of the type in general use, or where the depositor knows the character of the boxes when he makes the deposit and where the boxes are protected in the usual manner.

SET-OFF.

Bank May Set Off Deposit Against Matured Note.

A bank holds a past due note of a customer, who has on deposit an amount more than sufficient to cover the note. Has the bank the right to apply the amount on deposit to the payment of the note?

The bank has the right to apply enough of the amount on deposit to the credit of the customer to satisfy its claim against him. The rule is thus stated in *Michie on Banks and Banking*, Vol. 2, pp. 1009, 1011:

“The rule that a bank has a general lien upon or right of set off against all moneys or funds in its possession belonging to a depositor to secure the payment of the depositor's indebtedness is a part of the law merchant, and well established in commercial transactions. * * * It rests upon the principle that as the depositor is indebted to the bank upon a demand which is due, the funds in its possession may properly and justly be applied in payment of such debt, and it has, therefore, a right to retain such funds until payment is actually made. * * * A bank to which a depositor owes a matured debt may set off or apply such depositor's general deposit to the discharge of such debt.”

Bank May Set Off Deposit Against Note of Insolvent Debtor Before Maturity.

Where a depositor owes a bank a note, can the bank upon the insolvency of the depositor, apply his deposit in satisfaction of the note?

This question has been decided by the Supreme Court of Georgia. I quote from the case of *Georgia Seed Co. v. Talmadge*, 96 Ga. 254:

"Where a bank, having money on deposit with another, failed in business and became insolvent, being at the time indebted to the depositary upon promissory notes, the sum total of which exceeded the amount of the deposit, it was the right of the depositary, by way of equitable set off, to appropriate the money on deposit, as far as it would go, to the satisfaction of such notes, although they had not yet become due."

**Bank May Call a Demand Note and Apply to Its Payment
Proceeds of Check Presented for Payment by Maker.**

If a bank holds a demand note and the maker presents for payment a check payable to himself, can the bank call the loan and apply the proceeds of the check to its payment?

I think the bank would have the right to call a demand loan at any time, and if the maker presented a check payable to himself the bank could call the loan and insist on applying the check on the debt. If the bank demanded payment of the note and at the same time held on to the money due on the check and applied it to the payment of the note, the maker would have a very hard time forcing it to pay him the money. Of course this method of collection is a very unusual and harsh one and should not be resorted to unless it is absolutely necessary to collect the money.

**Bank May Set Off Deposit Against Series of Notes Purchased
as They Mature.**

Has a bank the right to charge to a depositor's account at the maturity thereof, respectively, a series of notes given by the depositor to a third person and purchased by it from such third person for value and before maturity?

A deposit in a bank creates the relation of debtor and creditor. The bank owes the depositor the amount of the deposit, which it agrees to pay to him or his order on demand. The right to offset mutual accounts is universally recognized. So a bank, as has been frequently held, has the right to charge to the account of the depositor at maturity any obligation of his in favor of the bank. The fact that the depositor's notes in the present instance were given to a third party makes no difference. They are still the obligations of the maker of the notes, who is also the depositor. The situation, therefore, is that the bank owes the depositor the amount of his deposit. The depositor owes the bank

the amount of the notes as they respectively mature. The bank has a perfect right to offset the amount due by it against the amount due to it. The depositor's direction not to charge the notes to his account could not affect the right of the bank to do so.

Bank May Set Off Deposit Against Note of Bankrupt Depositor.

Has a bank the right to offset a deposit against a past due note of its customer without his consent, where the customer files a voluntary petition in bankruptcy and schedules the deposit as an asset and the note as a liability?

The Bankruptcy Act expressly authorizes the set off of mutual accounts. This has been repeatedly held to include deposits in bank as against notes of the depositor. There are numerous decisions to this effect by the bankruptcy courts, including the Supreme Court of the United States, which, of course, is the final authority. Probably the leading case is that of the Continental & Commercial Trust & Savings Bank *v.* Chicago Title & Trust Company, 229 U. S. 434, 57 L. Ed. 1268, where the question was expressly ruled.

Bank May Set Off Deposit Against Matured Note of Deceased Depositor.

One who has money on deposit executes a note with personal indorsement which contains a clause authorizing the bank at maturity of the note to charge off to the satisfaction of the note any funds on deposit to his credit. The maker dies before the note matures. Has the bank the right, under the authority contained in the note, to charge off from the maker's general deposit, a sum sufficient to satisfy the note?

The power contained in the note is a power coupled with an interest and, under § 3575 of Park's Ann. Code, the death of the maker would not revoke the power. But, independently of the question of the power given to the bank to charge the amount to the depositor's account, a bank always has the right to offset the amount due by it to a depositor with any debt due by the depositor to it. The deposit in the bank creates the relation of debtor and creditor between the bank and the depositor, and there can be no question as to the right to set off mutual debts. This is allowed in case of the bankruptcy of a depositor, and the principle would hold good in case of the death of a depositor, provided, of course, the note has matured.

Bank Cannot Offset Deposit Against Note of Deceased Depositor Before Maturity of Note, Unless Estate Insolvent.

May a bank set off against a note owed it by a depositor, upon the death of the depositor, the balance to the credit of such depositor in advance of the maturity of the note?

The right of a bank to set off funds on deposit as against a note due it is thoroughly recognized. It has been so held by more than one decision of our Supreme Court. But while this is true, the right of set-off ordinarily does not exist until the note becomes due. As stated by Michie, "The general rule is, that a bank cannot apply a general deposit to an unmatured indebtedness of the depositor." 2 Michie on Banks and Banking, p. 1028.

Michie also says: "The death of a depositor does not deprive the bank of its right to apply his deposit to the payment of his indebtedness." 2 Michie on Banks and Banking, p. 1017.

Under our Code, while set-off is not generally allowed until a debt becomes due, it is allowable in case of insolvency or where the debtor is a nonresident, the language of the Code being: "If a plaintiff resides without this State, or is insolvent, the defendant may set off against him a debt not due, under such equitable terms as may be prescribed by the court." Park's Ann. Code, § 4349.

Whether or not in the case of the death of a depositor, his estate being solvent, the bank is allowed to set off a deposit, seems not to have been decided in Georgia. The decisions in other States are not uniform. Even in case of insolvency, a number of the courts hold that the right of set-off does not exist until the maturity of the paper. Other courts hold that where the estate of the depositor is insolvent or there is danger of insolvency, the bank is authorized to apply the deposit in satisfaction of the note. But this seems to be as far as the courts have gone.

In the absence of insolvency or other special circumstances, I do not think a bank would have the right to offset a deposit against a note which had not matured, or that the death of the depositor without more would give it such right.

Value of Clause in Note Giving Bank Right to Set Off Deposit Before Maturity.

What is the value of a clause in a note which authorizes the bank at its option at any time to apply to the payment of the note any money on deposit, whether the note is due or not?

I think this is a good provision and is enforceable. It sometimes enables a bank to protect itself where it has reason to sus-

pect that a party whose note it holds is getting in bad circumstances but who has not gone into bankruptcy or become insolvent. Without this provision, in the event of insolvency the

- bank would have the right, whether the note was due or not, to apply the deposit to the payment of the note, and it would have the right, regardless of insolvency, to apply the deposit when the note became due. There are some cases, however, where a bank would like to make the application, although the note was not due and the party was not then insolvent. In such instances, though, of course, they are rare, the clause would be of considerable value.

Bank Ordinarily Has No Right to Charge Note to Account of Indorser or Guarantor.

Has a bank the right to apply to the payment of a note the balance to the credit of a depositor who is an indorser on the note?

In the absence of a contract authorizing the bank to make such application of the deposit, I do not think under ordinary circumstances it would be allowed to hold the deposit and apply it to the payment of the note. The rule is thus stated in Michie on Banks and Banking, p. 1031 :

"In absence of a contract a bank has no right, without a depositor's consent, to apply his deposit to the payment of an obligation for which he is liable as a guarantor, indorser, or surety, as, for instance, a bill of exchange indorsed by such depositor and discounted by the bank; a check of a third person guaranteed by him; or a note, payment of which he has guaranteed, or on which he is liable as indorser or surety. The right may exist, under certain circumstances, even where the depositor is not primarily liable on the notes, as where the makers of the notes are insolvent and it appears that it was the intention of the party that their claims should be mutual credits."

The author's statement is well supported by the decided cases, and is undoubtedly the general rule.

Failure of Bank to Set Off Deposit Against Note of Maker Does Not Discharge Surety or Indorser.

Is it the duty of a bank for the protection of a surety or indorser to credit on a note at maturity the amount of the deposit of the principal or maker, such amount being insufficient to pay the note in full?

In the case of *Davenport v. State Banking Co.*, 126 Ga. 136, the Supreme Court holds that while a bank has a right when it has

on deposit funds sufficient to pay a note in full to charge the note to the account of the depositor, it is not obliged to do so for the protection of an indorser, and its failure to charge the note and permitting the deposit to be checked out will not relieve the indorser.

In discussing the question whether the bank should apply funds as a credit on the note when the deposit is not sufficient to pay it in full, the court says:

"It has been held by almost all the courts where the questions have arisen that if at the maturity of a note held by a bank the principal thereon has not sufficient funds on general deposit with the bank to pay it, the bank is under no duty to a surety upon the note to apply such funds of the principal as may then be on deposit to the payment of the note *pro tanto*, nor is it bound to pay the note from subsequent deposits of the principal, although they are sufficient for this purpose."

The Authorities Are in Conflict as to the Right of a Bank to Charge to Depositor's Account a Note Made Payable at the Bank.

Can a bank pay a note from the general deposit of the maker without specific direction from the maker to pay it, the note on its face being payable at the bank?

There seems to be a hopeless conflict in the decisions of the different courts on this question. The courts of Georgia, so far as I have been able to ascertain, have never passed upon it one way or the other.

I quote from Michie on Banks and Banking:

"In some jurisdictions it has been held that where one makes a note payable by its terms at a bank at which he is a general depositor, the bank is thereby authorized to pay it, on presentation when due, out of any funds of the maker then on general deposit with it, and is entitled to a proper credit in the account of the depositor, and may hold the note as the equitable owner or purchaser, and set it off in a suit to recover a balance due the depositor on a general account. But in other jurisdictions it has been held that a note executed by a depositor, payable at the bank, is not equivalent to a check, and that the bank has no authority to pay such note to a third party in the absence of a usage or of instructions from the maker to that effect; and that a usage to authorize such payment out of deposits of the maker at the bank must be general, uniform and certain, and known to both parties. But a depositor's parol direction to apply his deposit in payment of a note payable at the bank is sufficient to authorize

such application. In jurisdictions where it is held that a bank is authorized to pay a note payable at the bank out of the funds of the maker on general deposit with it, the burden of proof is on the bank to show that the note was payable at the bank, in an action by the maker for the conversion of a portion of his deposit by paying such note without his special authority." 2 Michie on Banks and Banking, § 144, p. 1168.

This quotation embodies a fair statement of the rulings of the different courts. It will be seen that the courts are in direct conflict. The courts of Indiana, Ohio, New York, and Pennsylvania hold that a bank at which a note is payable can apply the funds of the maker held on deposit to the payment of his note. The contrary is held by the courts of Tennessee, Illinois, Massachusetts, and Louisiana.

Perhaps the leading cases upholding the bank's right to pay a note is a decision by the Supreme Court of Indiana. I quote:

"A bank which in good faith pays a note, made by one of its depositors, payable at its place of business and against which there is no defense, may set off the amount so paid against the balance due on the maker's account, although the payment was made without notice to, or express authority from, him." Bedford Bank *v.* Acoam, 125 Ind. 584, 25 N. E. 713, 9 L. R. A. 560, 21 Am. St. Rep. 258.

The court calls attention in this case to the fact that when money is deposited the relation of debtor and creditor exists between the bank and the depositor, and that the bank has the right to apply a sufficient amount of the deposit to the payment of any debt due by the depositor to the bank. It is said that if the bank had discounted the note or taken an assignment of it there would be no dispute as to its right to retain the amount due out of the depositor's account, and an analogy is drawn between a case of that kind and a case where the bank pays the note, which on its face is payable at the bank. As a further reason, the court says that one who has drawn a note payable at a bank must have done so for some purpose, and that he can not be heard to say after the bank has paid a just debt for which he had given his note, as to which he claims no defense, that the payment was wholly voluntary and unauthorized.

Perhaps the leading case on the other side of the proposition is from the Supreme Court of Tennessee. In an exceedingly vigorous and clear-cut opinion, this court denies that the bank has any right to pay the note of a depositor out of his general deposit. The court says:

"A bank has no implied authority to pay to a third party a note made by a depositor payable at its place of business simply because he has funds there sufficient for that purpose, in the absence of any course of dealing or previous instructions so to apply the deposits." *Grissom v. Com. Nat. Bank*, 87 Tenn. 350, 10 S. W. 774, 3 L. R. A. 273, 10 Am. St. Rep. 669.

The court argues that the relation of debtor and creditor is created by a general deposit, and that the depositor has only a debt against the bank, payable on demand, upon the presentation of an order addressed to the bank in unequivocal terms asking it to pay a certain amount to some person therein named or to bearer.

It is said also that where an agent receives money for his principal he can not make an application of such money to the payment of his principal's debt without the express or implied assent of the principal.

The court says that the words "payable at" are not synonymous with the words "by or through," and that the words "payable at the bank" are not a necessary part of the instrument, but that a note is as valid when made payable generally as when made payable at any particular place. These words, it is said, simply designate for convenience a place of payment.

In this case a distinction is drawn between a check and a note. It is pointed out that a check is a written order asking a bank to pay a certain sum of money, while a note is a promise to pay another a certain sum of money at a certain time; that one is payable on presentation, the other on a day certain; that one is an appropriation of money in a banker's hands, the other is a promise to pay; and that on the check ordinarily no right of action accrues until after presentment for payment, while on the note a right of action against the maker exists without such presentment.

This case, however, holds that a bank might so pay a note if there was a certain and uniform custom among the banks at a certain place so to pay. This is a very strongly reasoned case, and I am inclined to think states the true law on the question.

The text writers on the subjects of banks and banking and of negotiable instruments note the fact that there is a conflict of authority on this subject. Most of them seem to think that the weight of authority is in support of the view that a bank can pay a note out of a general deposit. The Tennessee court, however, in the opinion above referred to, undertakes to prove that the weight of authority is against the bank's right to pay.

Depositor May Set Off His Deposit with An Insolvent Bank Against His Note Held by That Bank.

Can a person who owes a note to a bank at the time it becomes insolvent set off, as against such note, money which is on deposit to his credit in the bank?

There is no doubt that a deposit can be set off against a note owed by the depositor to the bank. The general rule on the subject is thus stated in Michie on Banks and Banking, p. 1059:

"Where a depositor is indebted to a bank, he can set off his deposit against a debt due from him to the bank in the same right or capacity, on the principle that mutual claims which are between creditor and debtor may be set off against each other."

I also quote from the case of *Scott v. Armstrong*, 146 U. S. 499, 36 L. Ed. 1059:

"Where a national bank becomes insolvent and its assets pass into the hands of a receiver appointed by the Comptroller of the Currency a debtor of the bank can set off against his indebtedness the amount of a claim he holds against the bank, if the debt due from the bank was payable at the time of its suspension, but that due to it was payable at a time subsequent thereto."

Demand Deposits and Time Deposits Can Be Used Alike in Payment of Notes Due Insolvent Bank.

Do demand deposits in an insolvent bank have priority of payment over time certificates, and can they be used in payment of notes due the insolvent bank?

The Supreme Court in the case of *Lamar v. Taylor*, 141 Ga. 228, held that the holders of time certificates were depositors and entitled to rank as such, there being no difference as to priority between demand and time deposits.

Demand deposits as well as time certificates can be set off against notes.

NOTE.—The Banking Act, § 2, provides that the term "depositor means any person who shall deposit money or commercial paper in any bank, either on open account, subject to check, or to be withdrawn otherwise than by check, whether interest is allowed thereon or not, and shall include holders of demand and time certificates of deposit lawfully issued."

Executor or Administrator Cannot Set Off Deposit in His Own Name Against Debt Due by Estate.

Can an executor or administrator set off a deposit in his own name as an individual against a note which the estate he represents owes the bank? Or can he set off against a debt owed by him individually to the bank a deposit made by him as executor or administrator?

"Set off must be between the same parties and in their own right." Park's Ann. Code, § 4341. Therefore, an executor or administrator is not entitled to set off against his liability as such executor or administrator a debt from the bank to him as an individual; nor can he set off against a debt which he owes individually an indebtedness of the bank to himself in his capacity as representative of the estate. The rule is clearly stated in Morse on Banks and Banking, § 334, as follows: "The debts must be between the same parties and in the same right. A deposit due to A as executor, cannot be offset against A's personal debt, nor *vice versa*."

A Member of a Partnership Cannot Set Off Against His Note, a Deposit in Name of the Firm.

A member of a partnership is indebted to a bank on his individual note. When sued on this note can he set off a deposit in the bank in the name of the firm of which he is a member?

This question is controlled by the decision of the Supreme Court of Georgia in the case of *Bishop v. Mathews*, 109 Ga. 790. I quote the headnote:

"A defendant in an action brought against him individually upon a demand for the payment of which he is individually liable, cannot, without showing some equitable reason for being allowed to do so, set off against the plaintiff's claim a debt due by the latter to a partnership of which the defendant is or had been a member."

This seems to be the general rule on the subject. It is thus stated in Michie on Banks and Banking, p. 1066:

"As a general rule a partnership deposit cannot be set off against the debts of individual members of the partnership owed to the bank, unless there be some special equity or equities to justify it. Such special equities may arise under circumstances of fraud; or where there are a series of transactions in which joint credit is given with reference to the special debt; or where the mode or course of dealing is such as to furnish a presumption that there was an agreement that the mutual dealings on each side, and in-

dependent debts, were to be set off against each other, and that, without such right of retaining against each other, the parties would not have continued dealing with each other."

A Deposit in a Bank Can Be Set Off by a Stockholder Against An Unpaid Stock Subscription Unless the Bank Is Insolvent.

Can a stockholder in a bank use a deposit to his credit in payment of an unpaid balance on a subscription to the stock of the bank?

Under the Code:

"Between the parties themselves any mutual demands existing at the time of the commencement of the suit may be set off. Set off must be between the same parties and in their own right." Park's Ann. Code, §§ 4340, 4341.

A deposit in a bank creates the relation of debtor and creditor between the bank and the depositor. The bank owes the depositor the amount which it has received from him and which it undertakes to pay on demand. By subscribing to the stock of a bank the subscriber becomes liable to pay to the bank the amount of his subscription. The question presents a case of mutual demands existing between the parties in the same right; and, under the Code, one could be offset against the other.

But when the bank is insolvent and the unpaid subscriptions are being enforced in equity for the benefit of creditors such an offset is not permitted. In the first case, the obligations are mutual and can, therefore be set off. In the second case, the courts hold that the obligations are not mutual and that set-off is not allowed. I quote from a decision by the Supreme Court:

"Shareholders of an insolvent corporation who are indebted to it upon unpaid stock subscriptions and who are also its creditors can not, in defense to an equitable proceeding brought by another creditor in behalf of himself and all the creditors of the corporation to wind up its affairs and, as an incident thereto, subject these shareholders to liability upon such stock subscriptions, set off against the amounts due thereon the debts due to them by the corporation. In such a case, 'they must pay up what they owe like other debtors, and then get their dividends like other creditors' when the court distributes the assets among those entitled to the same." *Wilkinson v. Bertock*, 111 Ga. 187.

A Deposit Cannot Be Set Off Against an Assessment for the Statutory Liability of a Stockholder.

Where a bank has failed and it is necessary to collect the full assessment from the stockholders, can a stockholder who was also a depositor set off his deposit against his assessment, the bank not being able to pay its depositors in full even after collecting the hundred per cent assessment?

A stockholder, who is also a depositor, cannot set off the amount of his deposit against the assessment levied on him by reason of his individual liability as a stockholder in the bank, where the amount to be realized from the assessment upon the stockholders will not pay in full all the depositors.

The rule is thus stated in Morse on Banks and Banking, Vol. 2, p. 410:

"Where one is a creditor as well as a stockholder, he cannot avail himself of the debt owing to him by the bank by way of set-off to diminish his contributory share. His liability as a contributor for the benefit of creditors must be distinguished from his character as a simple contract debtor to the bank upon ordinary business transactions."

STOCK.**Definition of Preferred, Common, and Watered Stock.**

What is the difference between preferred stock and common stock? What is the meaning of watered stock?

Without undertaking to give an accurate technical definition, preferred stock differs from common stock in that it is entitled to preference in dividends over common stock, and sometimes also to preference on the final distribution of the corporation's assets. A corporation sometimes issues preferred stock as a means of borrowing money, though holders of preferred stock are stockholders rather than creditors. The holders of this stock are generally entitled to be paid dividends of some fixed amount before any dividends are declared on the common stock, and sometimes it is provided that in the event dividends are not declared in any one year they shall be cumulative, and when dividends are declared at any later time the holders of the preferred stock are entitled to be paid dividends for the intervening period until they have received the regular stated dividend for each year, before any dividends are declared and paid to common stockholders.

By "watered stock" is meant stock issued without corresponding value being paid to the corporation. For instance, one common method of financing a railroad company is for a construction company to be organized for the purpose of building the road, the work to be paid for by issuing the bonds of the company and so much of the stock of the railroad company. This stock frequently represents no value at all, the road being really paid for by the sale of the bonds. Stock issued under such circumstances would usually be regarded as watered stock. So sometimes a corporation in order to secure money will issue so much stock as a bonus to go along with an issue of bonds. Sometimes a stock dividend is declared by a corporation when its surplus and profits are not sufficient to cover the stock issued; such excess stock would be "watered." The term has no fixed definite meaning, but implies, as will be seen from the illustrations, simply that the stock does not represent actual capital paid into the company.

Pledgee of Stock Is Entitled to the Dividends Thereon.

Stock of a corporation is pledged, the corporation being notified of the fact, but the name of the pledgee not being given, is the pledgee entitled to the dividends on the stock or must they be paid to the pledgor?

I quote from a decision of the Supreme Court of Georgia:

"Where stock of an incorporated company is pledged by the owner as collateral security for the payment of a debt, the pledgee is, as a general rule, entitled to collect and receive the dividends thereon, unless this right is reserved by the pledgor at the time the pledge is made.

"If the company by which the stock was issued, with notice of the fact that the pledge has been made, pays the dividends to the pledgor, it is ordinarily liable to the pledgee for such dividends, although the stock has not been actually transferred on the books of the company." *The Guarantee Co. of N. A. v. East Rome Town Co.*, 96 Ga. 511.

I do not think it would make any difference that the notice did not specify to whom the stock had been hypothecated. The fact that the notice is given would make the corporation liable to the pledgee for the dividend, and it would pay it to the pledgor of the stock at its own risk.

Administrator or Other Fiduciary May Vote, Either in Person or by Proxy.

Can an executor or administrator vote stock of the estate of which he is the representative at meetings of the stockholders of the corporation? Can a guardian vote his ward's stock?

The executor or administrator is entitled to vote the stock, whether it has been transferred and stands in his name as executor or administrator, or still stands in the name of the deceased. I quote from Cook on Corporations, § 612, p. 1669:

"An administrator or executor may vote on the stock of the deceased stockholder, even though such stock has not been transferred to the executor or administrator on the books of the company."

The guardian of a minor can vote the minor's stock, the same rule applying as in the case of the executor. The general rule is that any trustee, or person acting in a fiduciary capacity, has the right to vote the stock whether standing in the name of the trustee or of the beneficiary. And as administrators, executors and guardians have the right to appoint agents or attorneys in fact (Park's Ann. Code, § 4004), they may be represented and vote by proxy as well as in person.

Holder of Forged Stock Certificate Acquires No Rights Against Corporation.

A bank holds as collateral security a certificate of stock of another bank which is believed to be a forgery, but upon which the other bank's seal is affixed. What right has the first bank against the other bank if the certificate is a forgery?

The general rule is that no one acquires any rights under a forged instrument. It is an absolute nullity. A forged instrument, no matter how the forgery may be effected or how perfect it may be, is ordinarily void even in the hands of a *bona fide* holder.

The rule as to certificates of stock is thus stated in Cook on Corporations, 6th Ed., § 293:

"Where a certificate of stock is forged by persons other than the corporate officers, the corporation is, of course, not liable thereon, unless it has recognized such certificate in some way. But where the forgery was by a corporate officer or has been recognized in some way by the corporation, difficult questions arise. The law on the subject is somewhat unsettled, and at present each case seems to turn largely on the facts in that

case. In Massachusetts the rule seems to be that the corporation is not liable if forgery enters into the transaction. In England the same rule seems to prevail, and in New York the oldest decision is to the effect that the corporation is not liable."

The fact that the seal of the corporation has been attached to the certificate by some one not authorized would not make the certificate genuine or give the holder any rights as against the corporation. The seal is no more than the signature of the corporation, and if attached by one having no authority would confer no more rights than if the name of the corporation was signed by someone without authority.

Power of Attorney Authorizing Transfer of Stock May Be in Blank.

Can a bank transfer a certificate of stock to a named person where the power of attorney authorizing the transfer is signed in blank, the name of the transferee not being entered?

Yes. It is not at all unusual for powers of attorney to be signed in blank. A bank is authorized to transfer stock upon a power so executed.

Pledgee of Stock Is Entitled to Have Same Transferred to Him on Books of Corporation.

Can one holding bank stock as collateral have such stock transferred and reissued to him as pledgee?

The pledgee of a certificate of stock has the right to have the stock transferred to him on the books of the bank or other corporation, to collect the dividends declared on the stock and vote the same at all meetings of stockholders, and to exercise all other privileges accorded to the owner of the stock. It is not usual for the pledgee or holder of stock as collateral to have the stock issued to him specifically as pledgee, though this is done in some cases. It is a proper method of indicating his true relation to the stock.

Transfer of Stock Before Judgment Valid as Against Judgment Even Though Not Recorded on Books of Company.

A share of bank stock was sold under execution against the stockholder. The original certificate had been transferred prior to judgment against the stockholder, but there had been no transfer on the books of the bank. Can the bank issue a new certificate to the purchaser at the sheriff's sale?

The bank would not be authorized to issue a new certificate of stock to the purchaser of the shares at the sheriff's sale if the original certificate was transferred prior to the judgment against the stockholder, although the transfer had not been made upon the books of the bank. "Except as against the claims of the corporation a transfer of stock does not require a transfer on the books of the company." Park's Ann. Code, § 2219. And it has been held by the Supreme Court that, where neither the charter nor the by-laws of the corporation require that stock be transferred on the books of the company or the surrender of the certificate and the issuance of a new one to the assignee, any mode or form of conveyance sufficient in law to transfer the absolute title to the assignee entitles such assignee to all the rights and benefits accruing to the assignor, just as if the certificate of stock stood in the assignee's name. *Sylvania & Girard R. R. Co. v. Hoge*, 129 Ga. 734.

Under this decision the original purchaser of this stock would be the stockholder regardless of whether the stock had been transferred on the books or not, and the sheriff's sale could not defeat his rights. It is true that the purchaser at a sheriff's sale has the right, ordinarily, to compel the corporation to transfer to him the stock purchased, but in the event he should undertake to compel a transfer, a complete answer would be that the stock had been transferred before the judgment was obtained and that, therefore, the sheriff's sale was void.

Pledge of Stock Is Superior to Judgment Against Pledgor

Does a judgment obtained subsequently to the transfer of stock pledged as collateral take precedence over such transfer, if the transfer has not been entered upon the books of the corporation?

It does not.

"Except as against the claims of the corporation, a transfer of stock does not require a transfer on the books of the company." Park's Ann. Code, § 2219.

Indeed, the lien of a judgment does not attach to stock in a corporation from the time of its rendition, but only from the date of the levy, and notice to the corporation and the defendant as provided by § 6035 of the Code. Quoting from the Supreme Court:

"Stock in a corporation is a chose in action. In the absence of a statute it would not be subject to levy or sale. By the Act of 1822 (Cobb's Digest 511, 512) the lien of the judgment against the shareholder attached from the date of its rendition, but had to be kept alive by giving notice within twenty days to the corporation. This policy is reversed by the Civil Code, § 5431 (§ 6035). The lien now does not attach to the stock upon the rendition of the judgment, but only after notice acting as a sort of garnishment on the corporation, or withholding the lien until levy as under the Civil Code, § 3125 (§ 3701). Until this notice is received the statute recognizes that the company may make transfers notwithstanding the existence of a judgment against the shareholder. The *quasi* negotiable character of stock, the fact that certificates indorsed in blank may and do pass from hand to hand, and the necessity of preserving the rights of that large body of the public who buy and lend on the faith of shares, was no doubt the reason for the change made by the Code in the Act of 1822." *Owens v. Atlanta Trust & Bkg. Co.*, 122 Ga. 523.

**Transfer of Stock of Deceased Nonresident Can Be Made
Only on Order of Executor or Administrator After Four
Weeks' Published Notice.**

Would a bank be safe in transferring stock standing in name of deceased nonresident to party claiming to be only heir, where it is agreed by all parties having knowledge that there was only one heir and such heir makes affidavit that decedent left no debts?

The only way in which a bank can be safe in transferring the stock of a deceased nonresident is upon the order of an administrator or executor, certified copy of the appointment and qualification of such executor or administrator being filed with the bank, and notice being given once a week for four weeks in the newspaper in which sheriff's sales are advertised in the county in which the bank is located, of the intention to make the transfer as provided by statute.

In the case inquired about the stockholder is supposed to have left only one heir and no debts. If this is the fact, no one could complain of the transfer of the stock to this heir, but if the transfer is made in any manner except in accordance with the statute,

the bank takes the risk of doing so. Should there be other heirs, the transfer to the one would be no protection, and should there be creditors the bank would be liable to them.

The whole matter is regulated by § 4105, Park's Ann. Code.

STOCKHOLDERS.

Bank Is Not Required to Furnish a Stockholder with List of Stockholders.

Is a bank required to furnish to one of its stockholders a list of all of its stockholders?

The National Bank Act provides:

"The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency." U. S. Comp. Stat., § 9773; U. S. Rev. Stat., § 5210.

Practically identical provisions governing State banks are contained in § 189 of the Banking Act of 1919, except that the copy of the list is transmitted to the superintendent of banks. While the list must be kept and is subject to inspection by the stockholders, there is no requirement for furnishing the list to a stockholder on his demand.

Stockholder's Liability Is Provable Debt Dischargeable in Bankruptcy.

Can a stockholder of a failed bank avail himself of the National Bankruptcy Act to escape his stock liability, or is this assessment on the shares of stock in the nature of a trust fund and not dischargeable in bankruptcy?

Section 17 of the Bankruptcy Act as amended provides that a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as are: 1. Taxes; 2. Liabilities for

obtaining property by false pretenses, and similar cases; 3. Debts not scheduled; or 4. "Where created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity."

It will readily be seen that the stockholder's liability is not comprehended within any of the excepted classes. When the liability becomes fixed, it is a provable debt, and one which would be discharged in bankruptcy. This has been decided in the case of *Dight v. Chapman* (D. C. Oregon), 12 Am. B. R. 743, holding that a judgment against a stockholder for the amount of his liability "is a provable debt within the meaning of the Bankruptcy Act and is released by his discharge."

Bank Is Liable as a Stockholder Where Stock Is Transferred to It on the Books of the Corporation, Though as Collateral Security Only.

Is a bank to which stock in another bank is transferred as collateral, the stock being issued in the name of the bank, liable as a stockholder in the event of the failure of the bank whose stock it holds?

A bank holding stock in another bank is liable just as any other stockholder would be.

"Where the charter of a bank imposes on all of its stockholders personal liability to its creditors, such liability attaches as well to those who acquire a complete legal title to stock of the bank by having the same transferred to them as collateral security for debts due by the transferrers as to those who purchase such stock outright." *Chatham Bank v. Brobst*, 99 Ga. 801 (2).

Nor would the fact that the bank is a national bank make any difference. While it is true that a national bank may not acquire the stock of another as an investment, and that it may set up the illegality of such acquisition when sought to be held liable for an assessment on such stock, yet the rule is otherwise where the acquisition of the stock results from a pledge or is in satisfaction of a debt. This has been settled by the decision of the Supreme Court of the United States in the case of the *Germania National Bank v. Case*, 99 U. S. 628, 25 L. Ed. 448. In that case the Germania National Bank held as collateral certain stock in the Crescent City Bank, which subsequently failed. The Supreme Court held that the Germania Bank was liable as a stockholder. I quote from that case:

"It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors."

This was held notwithstanding the fact that the Germania Bank had transferred the stock of the Crescent City Bank which it held as collateral to a clerk in the Germania Bank, the transfer to the clerk having been held to be merely colorable, the Germania Bank being regarded as the beneficial owner of the stock.

Suits Against Stockholders on Their Statutory Liability May Be Brought at Any Time Within Twenty Years.

What is the period of limitation on suits by a receiver against the stockholders of a bank to enforce their individual liability?

This question is settled by the case of *Wheatley v. Glover*, 125 Ga. 710. It was there held that the liability being a liability fixed by statute is governed by the period of limitation fixed by § 4360 of the Code, which is twenty years.

Person in Whose Name Stock Stands on Books of Bank Is Primarily Liable for Assessment, Though Stock in Fact Transferred.

A stockholder in a national bank sold his stock to the cashier of the bank. The transfer of the stock was not made on the books of the bank. Shortly after the sale, the bank became insolvent. Would the seller of the stock be liable on his statutory personal liability? Would not the notice to the cashier, who purchased the stock, be notice to the bank of the transfer, and thus relieve the seller of his statutory liability?

The stockholder would not be relieved unless the transfer was made on the books of the bank. The rule is thus stated in *Michie on Banks and Banking*, p. 1865:

"A person who appears upon the records of a national bank to be a stockholder at the time the bank becomes insolvent, is subject to statutory personal liability of shareholder, although he has previously, in good faith, sold his stock. To relieve a holder of national bank stock from his liability for the debts of the bank, a transfer by him must be made on the books of the bank; the ordinary method of signing the power of attorney thereon is insufficient."

This quotation is abundantly supported by authority.

I do not think that the bank had notice through the cashier who

purchased the stock and to whom it should have been transferred. Since the cashier was acting for himself in the transaction, any knowledge gained by him would not be notice to the bank. It has been held by the Supreme Court of Georgia that "a corporation is not to be charged with notice of facts of which its president acquires knowledge while dealing in his private capacity and in his own behalf with third persons." *Peoples Bank v. Exchange Bank*, 116 Ga. 820. This principle would apply in the case of a cashier or other officer of the bank, as well as in case of the president. The principle of the case above quoted has been repeatedly announced by the Supreme Court. *Eng. Amer. L. & T. Co. v. Hiers*, 112 Ga. 823; *Brobston v. Penniman*, 97 Ga. 527; *Morris v. Banking Co.*, 109 Ga. 12; *National Bank v. Demere*, 92 Ga. 735.

It is suggested that the case of *Whitney v. Butler*, decided by the Supreme Court of the United States, and reported in 118 U. S. 655, 30 L. Ed. 266, conflicts with the principles above announced. It is held in that case that "the responsibility of the defendants ceased upon the surrender of certain stock certificates to the bank, and the delivery to its president of a power of attorney sufficient to effect, and intended to effect, as that officer knew, a transfer of the stock on the books of the association to the purchaser; although such transfer was not in fact made."

It will be noted from this case, however, that the certificates had been surrendered to the bank itself, accompanied by a power of attorney authorizing the transfer, and that the president of the bank was advised that the transfer should be made, the president himself not being in any way interested in the purchase of the stock.

The cases which Mr. Justice Harlan distinguishes in this case, according to his statement of them, hold that the seller is liable as a shareholder, even where the buyer has agreed to have the transfer made on the books of the bank, but fraudulently or negligently failed to do so. They also hold that the liability of the shareholder continues until there is a transfer on the books of the bank, even where he has in good faith previously sold the stock and delivered to the buyer the certificate with power of attorney in such form as to enable the transfer to be made. Under these rulings, there would seem to be no question as to the seller's liability, unless the bank had some other notice of the transfer

than the knowledge of the cashier to whom the stock had been sold.

Note.—Under the Banking Act, § 140, the rule is the same with reference to State banks as that above stated.

SURETY.

Consent of Surety Necessary to Extension in Favor of Maker.

Where a note held by a bank is secured by personal security and the maker desires to attach a cotton receipt and extend the note, can the bank hold the personal security without notifying him?

In order to hold the surety still liable on the note, it would not only be necessary to notify him but also to have his consent to the extension of time. A contract of suretyship is one of strict law, and a surety's liability cannot be extended or changed in any way, without his consent. A change of the terms of a contract without the consent of the surety discharges him. Any act of the creditor which injures the surety or increases his risk or exposes him to greater liability will discharge the surety. A mere failure by the creditor to sue as soon as the debt becomes due will not release the surety, but any extension based upon additional security or any other consideration will release the surety unless he consents. This is very clearly provided by §§ 3543 and 3544 of Park's Ann. Code.

TAXATION.

How Return of Banks for State and County Taxes Should Be Made.

What is the proper way to make the returns of a bank for State and county tax?

The statute makes this quite plain, but neither the tax authorities nor the banks generally seem to understand how it should be done. The Act of 1909, which is codified as § 991, Park's Ann. Code, provides:

"No tax shall be assessed upon the capital of banks, or banking associations, organized under the authority of this State, or of the United States, located within this State, but the shares of the stockholders of the banks or banking associations, whether resi-

dent or nonresident owners, shall be taxed in the county where the banks or banking associations are located, and not elsewhere, at their full market value, including surplus and undivided profits, at the same rate provided in this article for the taxation of moneyed capital in the hands of private individuals; provided, that nothing in this section contained shall be construed to relieve such banks or banking associations from the tax on real estate held or owned by them; but they shall return said real estate at its fair market value, in the county where located. Provided, further, That where said real estate is fully paid for, the value at which it is returned for taxation may be deducted from the market value of their shares; and if said real estate is not fully paid for, only the value at which the equity owned by them therein is returned for taxation shall be deducted from the market value of their shares.

"The banks or banking associations themselves shall make the returns of the property and the shares herein mentioned, and pay the taxes herein provided. Provided, further, That all property used in conducting or operating a branch bank shall be returned for taxation in the county where such branch bank may be located. The true intent and meaning of this section is that the bank itself shall return for taxation and pay the taxes on the full market value of all shares of said bank stock."

As a concrete example a bank has a capital of \$50,000.00, surplus and undivided profits, \$25,000.00. This would make the book value of its stock \$150.00 per share. As there are 500 shares at \$150.00 per share, the amount would be \$75,000.00. However, the market value is hardly ever as much as the book value. If from recent sales a market value has been established, this market value should be substituted for the book value in determining the value of the shares. If there have been no recent sales from which the market value can be arrived at, I think the bank would be safe in making the market value somewhat less than the book value. Having arrived at the value of the stock, the bank would be authorized to reduce the value in the same proportion that the market value of other property in the county is reduced in making returns for taxes. This proportion varies somewhat in the different counties, usually ranging from approximately sixty to seventy-five per cent. If the aggregate market value of its shares is \$75,000.00, and other property is returned at seventy-five per cent. of its value, the bank would be authorized to deduct twenty-five per cent. from the \$75,000.00 to arrive at the market value of its shares. Now, suppose the bank owns its building and other real estate amounting to \$10,000.00. This should be separately returned on the same proportional basis that other property bears,

and this amount should be deducted from the market value of the shares so that the return would show market value of shares \$56,250.00 (being \$75,000.00 at seventy-five per cent.) less real estate \$7,500.00 (being \$10,000.00 at seventy-five per cent. of actual value), total value of shares and real estate, \$56,250.00.

In the blank furnished by the taxing authorities are questions to be answered by the presidents of the banks, framed with a view to arriving at the result above reached. The questions asked are, how many shares in the bank, and what is the market value; also what is the market value of real estate; then the question is also asked how much capital, surplus and undivided profits. The idea apparently is to get this as a basis for determining whether or not the market value of the shares is correctly given. These are not questions to be answered by the bank in making its own return, but seem to be framed with a view to reaching the conscience of the president and determining from his return whether or not the bank's return is correct.

NOTE.—Since this opinion was written, the Banking Act was passed. Section 3 of this act contains this further provision as to the taxation of branch banks: "Branch banks shall be taxed on the capital set aside to their exclusive use in the counties, municipalities and districts in which they are located, and the parent bank shall be relieved of taxation to the extent of the capital set aside for the exclusive use of such branches."

Real Estate Owned by Bank Must Be Returned in County in Which It Is Located.

How is real estate owned by a bank in a county other than that in which the bank is located returned for State, county and municipal taxation?

Under § 991, Park's Ann. Code, real estate owned by a bank is to be returned for taxation in the county in which it is located and the value thereof may be deducted from the market value of the shares of stock. The bank's return would show so much real estate in the county in which the bank is located, so much real estate in other counties. This should then be deducted from the market value of its shares, and the bank would pay taxes in the county in which it is located on the difference.

Liberty Bonds Cannot Be Deducted from the Market Value of the Shares of Stock in Making Tax Returns.

A considerable portion of a bank's surplus is invested in Liberty Bonds. The bank bought these bonds with the understanding that they would not be subject to taxation. Can county and city authorities tax the capital and surplus as though the bank had no such investment in bonds?

Under our law, banks are not taxed upon their capital and surplus, nor upon their property, except real estate. The taxes which the banks are required to pay are taxes against the stockholders on the market value of their shares of stock. The bank is required to pay on its real estate, and is authorized to deduct the value of the real estate from the aggregate market value of the shares of stock; but, except on the real estate, the tax is not against the bank, but is against the stockholders.

Our tax act, so far as banks are concerned, is practically copied from the National Bank Act which prohibits the States from taxing national banks, but authorizes them to tax shareholders of national banks on the value of their shares of stock.

The Supreme Court of the United States has held that, under the National Bank Act, taxes may be levied on the full value of the shares of stock, regardless of the fact that the bank may own bonds which are free from taxation. Said the court in one case:

"The Van Allen case (3 Wall. 573, 18 L. Ed. 229), has settled the law that a tax upon the owners of shares of stock in corporations, in respect of that stock is not a tax upon United States securities which the corporations own. Accordingly, such taxes have been sustained by this court, whether levied upon the shares of national banks by virtue of the congressional permission, or upon shares of State corporations by virtue of the power inherent in the State to tax the shares of such corporation. The tax assessed to shareholders may be required by law to be paid in the first instance by the corporations themselves, as the debt, and in behalf of the shareholder, leaving to the corporation the right to reimbursement for the tax paid from their shareholders, either under some express statutory authority for their recovery or under the general principle of law that one who pays the debt of another, at his request, can recover the amount from him. * * * The theory sustaining these cases is that the tax was not upon the corporations' holdings of bonds, but on the shareholders' holdings of stock." *Home Savings Bank v. City of Des Moines*, 205 U. S. 503, 51 L. Ed. 901.

Under the decisions of the Supreme Court, the amount of taxes to be paid by the shareholders, or by the bank for them, will not be affected one way or the other, because among the bank's assets are Government bonds which are tax free. The stock is assessed

on its market value regardless of the property in which the bank's assets may be invested.

Bank Must Itself Make the Return and Pay the Taxes for Its Stockholders.

Can a bank furnish the county tax receiver a list of the stockholders of the bank, so that the taxes may be assessed against the individual stockholders and the bank in that way relieved of the payment of any taxes whatever?

It is not possible to handle the matter in this way. Section 991 of Park's Ann. Code, providing for the taxation of banks, requires that:

"The shares of the stockholders of the banks or banking associations, whether resident or nonresident owners, shall be taxed in the county where the banks or banking associations are located and not elsewhere. * * * The banks or banking associations themselves shall make the returns of the property (real estate) and the shares herein mentioned and pay the taxes herein provided. * * * The true intent and meaning of this section is that the bank itself shall return for taxation and pay the taxes on the full market value of all shares of said bank stock."

This obviously settles the question; the bank itself being required to make the return and to pay the taxes for the stockholders.

Banks Are Not Required to Produce Books to Tax Officers Except Under Subpoena, Where Returns of Particular Taxpayer Are Under Investigation.

Has the legislature passed an act making it incumbent upon a bank to open its books for the inspection of the tax collector?

It has not. There is a section of the Tax Equalization Act of 1913, Park's Ann. Code, § 1116 (m), which gives to the county board of tax assessors authority to issue subpoenas for the attendance of witnesses and "to require the production by any person of all his books, papers and documents which may throw any light upon the question of the existence or liability of property of any class for taxation." Under this section the county boards of assessors in a number of the counties have called on the banks to produce their books showing their individual depositors or to furnish lists of such depositors with their balances. The banks have

generally declined to do this, except in cases where the return of a particular taxpayer was being investigated by the board and the bank was called on to produce the book showing the account of this particular taxpayer. Where the board is investigating a particular return and regularly issues a subpoena requiring the production of the bank's books in connection with this particular return, and the bank fails to comply, the assessors have the authority to report the matter to the ordinary, who may upon a hearing impose a fine not to exceed \$100.00 or imprisonment not exceeding ten days, in his discretion. But the county board of assessors has no authority to require a bank to produce its books generally or to open its books for their inspection, and the bank is justified in declining to permit any such inspection by the county board of assessors or the tax collector, or any other agent or authority.

State Banks Are Liable for Corporation Tax.

Is a bank liable to the corporation tax in Georgia?

This tax applies to all corporations incorporated under the laws of Georgia, except those that are not organized for pecuniary gain or profit and those that neither charge or contemplate charging the public for services rendered, and is expressly made in addition to all other taxes required of them by law. Banks are not excepted, and are liable for the payment of the tax. § 950, Park's Ann. Code.

Municipalities May Levy Special License or Business Tax on State Banks.

Can a municipality levy a special license or business tax on a chartered State bank?

This question has been decided by the Supreme Court of Georgia in the case of the City of Macon *v.* Macon Savings Bank, 60 Ga. 133. It was held in that case that where the city charter gives to the city "authority to tax all persons exercising within the city any profession, trade, or calling, or business of any nature whatever," the city may tax chartered banks on their business, to the same extent that private banks are taxed therein. This decision has been followed several times in later cases and seems to be the fixed law of the State.

National Banks Are Not Subject to License Taxes.

Has a city the right to require national banks to pay license taxes?

In the case of *City of Macon v. First National Bank*, 59 Ga. 648, it was held:

"Whilst the property owned by the bank may be taxed by State authority, and the shares owned by the stockholders may be also taxed, the business of the bank—its right to operate and do banking business—cannot be taxed by the States. * * * The distinction between the right to tax property and that to tax business in cases of agencies working under Federal authority is well settled, we think, by the Supreme Court of the United States."

And in the case of *Johnston v. Mayor and Council of Macon*, 62 Ga. 645, it was said:

"It could not tax the business of the national bank, because it was chartered by Congress, and the Government of the United States used its business for their fiscal operations, or could use it, and any interference by State taxation might, if allowed at all, amount to prohibition—by making the tax so high as to be prohibitory."

In the case of *Linton v. Childs*, 105 Ga. 567, after quoting from the 59 Ga. and 62 Ga. cases above referred to, the court says:

"Considering, then, the propositions that a State cannot, by taxation or other legislation, impair or destroy the efficiency of the operation of any Federal agency created by a constitutional act of Congress to further and serve the purposes of the Government of the United States, and that national banking associations are one of such agencies whose business cannot be taxed by the State as fully established, it may be well to inquire into the nature of the tax imposed."

The court then held that the tax imposed on the presidents of each of the banks of the State, including all banks doing business in the State, is inoperative when sought to be applied to the presidents of national banking associations organized under the Acts of Congress, because the State had no right to tax the business of such banks.

These cases are based on the leading case of *McCulloch v. Maryland*, 4 Wheaton 316, 4 L. Ed. 579, which was the famous decision by Chief Justice Marshall, in which it was held that the States had no right to tax the Bank of the United States or its branches.

"The State governments," said the Chief Justice, "have no right to tax any of the constitutional means employed by the Government of the Union to execute its constitutional powers."

Since this decision the power of the Government to carry on its business through any means or instrumentalities which it might choose and free from any interference by taxation or otherwise on the part of the States, has been universally recognized.

**National Banks Cannot Be Taxed on Their Deposits, but Tax
May Be Levied Against the Depositors and Collected
Through the Bank as Their Agent.**

If the State should tax banks on their deposits, would such a law apply to national banks? Can the State compel a national bank to furnish the taxing authorities a list of depositors with the amounts of their balances?

The Supreme Court of the United States has held that a State is without power to tax national banks except under the permissive legislation of Congress. Under § 5219 of the United States Revised Statutes the power of a State to tax national banks is confined to the taxation of the shares of stock in the hands of the shareholders and to an assessment on the real estate of the bank. Any other tax than this is void. *Owensboro National Bank v. City of Owensboro*, 173 U. S. 664, 43 L. Ed. 850.

There have been numerous cases in which State tax acts in conflict with this rule have been held to be void, so far as national banks are concerned. There is no doubt that if the State should undertake to levy a tax against the bank itself based on its deposits such tax would not apply to national banks.

But there is nothing in the National Bank Act which prohibits the States from taxing the depositors of a national bank on the amount of their deposits. Indeed, in Georgia, and in most of the States, the amounts of their deposits are supposed to be included by the taxpayers in their returns for taxation, just as any other indebtedness due the taxpayer is returned.

There is no reason why a national bank may not be appointed as the agent of the State to collect the taxes from its depositors, just as it pays for its stockholders the taxes on their shares of stock. Acting as such agent would not interfere with the bank in the discharge of any of its obligations to the Federal Government; and, as such tax would not be against the bank, there would seem to be no reason why it should not be levied on the depositor and collected through the bank.

This has been decided by the Supreme Court of Vermont, construing an act of that State, similar in its terms to the recent act

of Kentucky, so much discussed in Georgia. This decision is summarized in Pratts' Digest, p. 159, as follows:

"The rule that a State can exercise no control over a national bank, except as Congress may permit, does not prevent the States from taxing the deposits therein against the depositors; and the State may make the bank its agent to collect the tax. *State v. Clement Nat. Bank*, 84 Vt. 167."

The case itself, reported in 78 Atl. 944, goes very fully into the whole question of the exemption of national banks from State taxation, but says "there is no provision in the Federal law depriving a State of the power to tax deposits in national banks to depositors."

The right of the State to tax a national bank on its deposits, is altogether different from the right of a State to tax the depositors themselves on their deposits in a national bank. A tax against the bank would be in the nature of a business tax, and the State would be unauthorized to put such tax on a national bank, Congress not having given to the State the right to tax a national bank, except upon its real estate, although it authorizes a tax upon the market value of the shares of stock, as hereinbefore stated.

The question as to the right of the State to compel a national bank to furnish a list of depositors with amounts of their deposits, etc., for the purpose of taxation, seems also to have been decided. I quote from the case of the First National Bank of Youngstown *v. Hughes*, 6 Fed. 737:

"A national bank may be compelled to disclose the names of its depositors, and the amounts of their deposits, under the compulsory process of a state court, in order to ascertain whether any money deposited therein, subject to taxation within the county, has not been duly returned for that purpose by the owners."

Municipality Cannot Tax Its Own Bonds.

Can a municipality levy a tax on its own bonds?

I do not think so. The Supreme Court in the case of *Penick, Tax Collector, v. Foster*, 129 Ga. 217, says:

"The general rule is that public property and the various instrumentalities of government are not subject to taxation. This immunity rests upon the most fundamental principles of government; being necessary in order that the functions of government be not unduly impeded, and that the government be not forced into the inconsistency of taxing itself in order to raise money to pay over to itself. * * *

"Bonds issued by a municipal corporation, as evidence of a loan made to it, are instrumentalities of the government which creates the municipal corporation. * * *

"Bonds issued by a municipal corporation of this State in the hands of a resident of this State are not taxable by this State or any county thereof."

And in the earlier case of the *City of Macon v. Jones*, 67 Ga. 489, the court said:

"The grant of power in the charter of a municipal corporation to tax all property, real and personal, within the corporate limits of the city will not be construed to include the taxing of its own bonds in the absence of express authority for that purpose."

It seems clear from these decisions that a city or town has no power to tax its own bonds in the absence of express legislative authority for the purpose.

Money Is Personal Property and Subject to Taxation.

Is there any form of money in circulation that is not subject to tax by local authorities?

Money is generally regarded as a proper subject for taxation. The rule is thus stated by the *Cyclopedia of Law and Procedure*, Vol. 37, p. 783:

"Money is not only the standard of value, but is also taxable personal property of the owner, provided he has it in his possession at the time of the assessment or it is held for him by a person from whom he is entitled to receive it on demand."

The Supreme Court of the United States has recognized the right of the States to tax money, and this although capital was employed in interstate or foreign commerce, which itself is not taxable. *People v. N. Y. Tax Commissioners*, 104 U. S. 466, 26 L. Ed. 632.

It is not meant, of course, that a State or a municipality could tax as such treasury notes or other forms of currency issued by the United States or its agencies as a means of borrowing money on the credit of the United States. It has been frequently held, following the decision of Chief Justice Marshall in *Weston v. City Council of Charleston*, 2 Peters 449, 7 L. Ed. 481, that the States have no power by taxation or otherwise to retard, or burden, or in any manner control the operations of the Federal Government or limit its power in the discharge of its constitutional rights. If the State could tax treasury notes as such, it

could, of course, drive them out of the market, and thus prevent Congress from employing this means of borrowing money. But, a tax on personal property, including money, notes and securities, is not considered a tax on the operations of the government or regarded as unconstitutional, although the taxpayer might have on hand on the day fixed for the assessment a quantity of treasury notes or other currency, issued by the government or through its instrumentalities. Such a tax would not be levied on these notes as such, but simply on the money as personal property, regardless of the particular character of circulating medium in which it might chance to be.

Bills Receivable Due Individual Are Subject to Taxation.

Are bills receivable due an individual operating a private bank subject to taxation?

The law expressly provides that:

"Promissory notes, accounts, judgments, mortgages, liens of all kinds, and all choses in action shall be given in at their value, whether solvent or partially solvent." Park's Ann. Code, § 1003.

If the law is strictly followed, bills receivable should be returned and taxed just exactly like horses or mules or physical property, and without deduction because the taxpayer may have liabilities.

Of course, a different rule applies to banks, that is, incorporated banks, the Code section clearly indicating that the tax on "banks" applies only to corporations doing a banking business, for it is provided that

"The shares of the stockholders of the banks or banking associations * * * shall be taxed, etc." Park's Ann. Code, § 991.

TAX FI. FAS.

Duration of Lien of Tax *Fi. Fas.* on Property.

How long is a tax *fi. fa.* a lien on property after it is recorded, and when does the lien run out?

The question is fully answered by the Code. I quote the sections applicable:

§ 1147: "All State, county, city or other tax *fi. fas.*, before or after legal transfer and record, shall be enforced within seven

years from the date of their issue; or within seven years from the time of the last entry upon the tax *fi. fa.* by the officer authorized to execute and return the same, if said entry is properly entered by said officer upon the execution docket and books in which said entries are now required to be made in cases of entries on executions issued on judgments."

§ 1148: "All laws in reference to a period of limitation as to ordinary executions for any purpose, or to the length of time or circumstances under which they lose their lien in whole or in part, are made applicable to tax *fi. fas.*"

§ 5950: "When any person has *bona fide*, and for a valuable consideration, purchased real or personal property, and has been in the possession of such real property for four years, or of such personal property two years, the same shall be discharged from the lien of any judgment against the person from whom he purchased."

TIMBER.

What Is a Reasonable Time Within Which to Cut and Remove Timber, Depends upon the Facts and Circumstances of the Particular Transaction.

Where timber is sold without any time limit for its removal, what is regarded by the law as a reasonable time within which to cut and remove the timber?

What is a reasonable time is always a question of fact, depending upon the circumstances of each particular case. The law never fixes a reasonable time. The time might be so long or so short that it could be said as a matter of law that it was or was not reasonable, but a reasonable time is a question of fact, rather than of law. In order to determine what is a reasonable time all the facts and circumstances must be taken into consideration. For instance, the purpose for which the timber is sold, the quantity of timber, its accessibility, the nearness of tram-road or other facilities for hauling, whether the timber is in a large or small tract, in other wards, everything that would illustrate the intention of the parties at the time the contract was made, what they contemplated as to the removal of the timber, and everything that would throw any light on the length of time, which under normal conditions would be proper and reasonable to be consumed in cutting and removing the timber. The average time usually fixed in timber leases of the same class, and in the

same general locality, would naturally be something of a guide in determining what was or was not a reasonable time.

It should be borne in mind that it is quite possible for timber to be conveyed in perpetuity without any limit of time, and so that the purchaser, his heirs or assigns, would have the right to remove it any time without regard to the reasonableness of the period, or might delay indefinitely the removal of the timber. I quote from a case decided by the Supreme Court:

"The paramount consideration in the construction of every instrument conveying growing trees, with the right to cut and remove them, is the intention of the parties as contained in the writing. If that intention be a sale and purchase of the trees, to be held as land, with a perpetual right of entry to remove them, the vendor is estopped by his own grant from compelling the vendee to cut and remove the trees at his own will, or even within a reasonable time. But if the instrument reflects the intention of the parties to sell the timber, to be cut and removed within a reasonable time, the interest or estate therein conveyed terminates and becomes forfeited by a failure to cut and remove the timber according to the terms of the grant. The grant of a perpetual right of entry upon the land of another to remove the timber thereon operates so harshly and unreasonably upon the owner of the land that it should never be given this effect, unless it is plainly manifest from the terms of the deed that such was the intention of the parties." North Georgia Co. v. Bebee, 128 Ga. 563.

TRANSFER PENDING SUIT.

Transfer of Property Is Not Prevented by Filing of Suit.

After suit is begun on a note, but before judgment is obtained, the debtor transfers his property to his wife. Is this transfer valid?

The mere filing of a suit does not prevent the transfer or sale of property so long as it is sold or transferred for a valuable consideration and the transfer is made in good faith, and not for the purpose of hindering, delaying or defrauding creditors. It does not appear from the statement whether this transfer was for value or not. Of course, a person cannot make a gift of his property, so as to defeat the payment of his debts, and such a transfer could be set aside. However, if the wife purchased property from her husband, paying full value, and the transaction was *bona fide* and not for the purpose of hindering, delaying or defrauding creditors, the title would pass, and could not be suc-

cessfully attacked. All transactions between husband and wife, where the husband is in debt, are very closely scrutinized, however, and the burden is upon them to show that the transaction is fair in every particular. Of course, after a judgment has been rendered and properly entered upon the execution docket, no sale could be made. The lien of the judgment would attach to the property, and no transfer could be made so as to defeat the lien.

TRUST COMPANY.

Cannot Issue Ordinary Negotiable Bonds.

Has a trust company the power to issue bonds?

I do not think so. The powers of trust companies organized under the general law of Georgia do not seem to include the right to issue ordinary negotiable bonds. The nearest approach to the power is this:

"When moneys or securities for moneys are borrowed or received on deposit or for investment, the bonds or obligations of the company may be given therefor." Park's Ann. Code, § 2817 (11).

While this language is not altogether clear, I understand it to mean that the company can issue certificates of deposit or obligations substantially equivalent to certificates of deposit therefor. I do not think this would authorize the pledging of the company's securities with a trustee and issuing negotiable bonds secured by such pledge. So far as I am advised, the issuance of bonds by trust companies is altogether unusual. In fact, it does not seem to be a proper power, and I do not think there is any doubt but that the power is not granted to a trust company organized under law of Georgia.

Use of Word "Trust" in Name of Company Chartered to Do General Real Estate Business Is Not Prohibited.

Can a company chartered to do a general real estate business use the word "trust" in its name without being regularly incorporated as a trust company?

In order to organize a regular trust company, authorized to do trust company business, the charter must be granted by the sec-

retary of State in much the same way that a bank charter is granted. The capital must not be less than \$100,000.00. There is, however, no prohibition upon the use of the word "trust" by corporations other than authorized trust companies, and there are quite a large number of such companies doing business in the State, most of whom are really nothing more than real estate companies. The propriety of the use of the word "trust" as a part of the name of such a company is doubtful, but there is no legal prohibition of such use.

A charter can be granted by the Superior Court to do the kind of business mentioned in the question, and there is no requirement as to the amount of capital which such a company must have.

Under an act passed in 1910, Park's Ann. Code, § 2821 (a-e), a corporation chartered by the Superior Court to do a general real estate business may have conferred upon it the powers of a trust company. A corporation desiring to exercise such powers must file with the Secretary of State an application for an amendment to its charter conferring upon it the powers and privileges of trust companies. The amendment must be authorized by a majority vote of the board of directors at a regular meeting, and it cannot be granted to a corporation which does not have a paid in capital of at least \$100,000.00.

USURY.

Penalty for Usury Is Forfeiture of Entire Interest Charged.

Can an individual lending money at a usurious rate, taking as security deed to real estate, obtain judgment on the note? Does the rule making the transaction void in cases of a corporation's charging usury in papers secured by real estate apply to individuals?

Formerly, titles infected with usury were void, whether the loans were made by individuals or corporations. This did not prevent the holder of the note containing usury from getting judgment on the note, but the judgment could only be for the principal and legal interest. The legislature in 1916 passed an act repealing the two sections of the Code fixing penalties for charging usurious rates of interest, and enacted in lieu thereof the following:

"Any person, company or corporation violating the provisions of § 3436 of the Code of 1910 shall forfeit the entire interest so charged or taken or contracted to be reserved, charged or taken."

And it was further enacted that

"no further penalty or forfeiture shall be occasioned, suffered or allowed further than as stipulated in Section 1 hereof." Acts 1916, p. 48; Park's Ann. Code, Supp. 1917, §§ 3438, 3438(a), 3442.

Under the law as now in force, the only penalty for charging usury is the forfeiture of the entire interest on the debt. Titles taken as security for usurious debts are valid to the same extent as though no usury had been exacted.

Usury in Homestead Waiver Note Will Not Relieve Indorser Since Act of 1916.

Under the Act of 1916, changing the penalty for usury, would a personal indorser or an accommodation indorser be relieved where the note was tainted with usury?

I do not think so. The reason an indorser or other person secondarily liable on a note tainted with usury was held to be released under the old law was that the usury voided the waiver of homestead contained in the note, and as the waiver was void the risk of the surety or other person secondarily liable was increased. The Act of 1916 repeals § 3442 of the Code, which made all titles to property taken as a part of usurious contract or to evade the laws against usury void. This section having been repealed, the waiver of homestead is good, although the note may be tainted with usury, and consequently the surety's risk is not increased, and he would be liable on the note.

Clause in Note That Surety or Indorser Knows That More Than 8 Per Cent. Is Charged Is of No Value Since Act of 1916.

What is the value of a clause in a note to the effect that the principal, surety, guarantor or indorser acknowledges that at the time of signing the note he was aware that more than 8 per cent. per annum interest was charged?

Since the passage of the Act of 1916 I do not think there is any advantage in putting the clause in a note. The homestead

waiver would be perfectly good now whether usury was charged or not, and as the surety was only released on account of the fact that usury rendered void the homestead waiver, and, therefore, increased his risk, there seems to be no longer any necessity for such a provision.

Renewal of Loan Infected with Usury, Though at Lawful Rate, Is Usurious.

How is it best to renew loans secured by deeds or bonds for title, upon which interest at 8 per cent. was added to the face of the paper, making the loan usurious, so as to preserve the security?

Any renewal which includes usury, although the new loan is at a lawful rate, would be usurious.

"A renewal of a contract infected with usury and the payment of the illegal interest to the date of renewal, cannot divest the contract of its taint. Where the original transaction was usurious, the usury infects all the securities given in renewal of the same debt, however varied in form and amount, and the law applies all payments made on the debt to the principal and legal interest. *Archer v. McCray*, 59 Ga. 546." *Lockwood v. Muhlberg*, 124 Ga. 660.

While this is true, a usurious debt can be paid even out of the proceeds of another loan made to the same party, provided it is an actual payment and not a mere cloak to cover the usury. *Bates v. Harris*, 112 Ga. 32.

In the event the loan is not paid, but simply renewed, care must be taken to purge the transaction from all usury, both the usury in the original loan and in any renewal thereof.

Renewing Debt, Eliminating Excessive Interest, Relieves Taint of Usury.

Where usury has been charged on a note, and the note is renewed with the excess interest formerly charged eliminated, the new transaction containing no usury, could the maker plead usury on account of the excess rate having been originally charged?

I do not think so. Indeed, the Supreme Court has held that:

"If one who owes to another a debt infected with usury obtains from him a loan of money at a lawful rate of interest, executes a deed to secure the payment of this loan, and out of the proceeds thereof actually and *bona fide* pays off the old debt, the deed is not void for usury; *aliter*, if the transaction as a whole be merely

colorable and designed as a cloak to cover up the usury in the original indebtedness." *Bates v. Harris*, 112 Ga. 32.

In discussing this ruling, Justice Lumpkin said:

"A debtor has an undoubted right to pay a debt infected with usury; and if he actually does it, that debt ceases to exist. That the payment is made out of the proceeds of a loan from the same creditor upon which a lawful rate of interest is charged cannot render usurious this loan or a deed given to secure it. If there be no actual payment of the old debt, and the amount thereof is simply included in the debt secured by the deed, the same is usurious and therefore void; for in that event, the transaction resulting in its execution is merely colorable, and obviously, a cloak designed to cover up the usury."

If a usurious debt can be paid from a loan of money subsequently made, there would seem to be no reason why a debt without the usury could not be renewed so as to relieve the transaction of its original taint.

Note Given Since Act of 1916 in Renewal of Usurious Note Given Before Act, Governed by New Law.

Where a new note is given since the passage of the Act of 1916 in payment of a note infected with usury given prior to that Act, is it governed by the old law or the new?

Under the question as stated, there is no doubt but that the new note would be governed by the new law. When the old note is taken up and cancelled, the taking of a new one constitutes a new transaction, though given in settlement of the old.

Loan Made at Legal Rate to Pay Usurious Debt to Third Party Is Not Infected With Usury.

If the president of a bank individually has for some years been carrying a note, secured by real estate, on which there was usury charged, and he should decide to lend the borrower funds of the bank to take up the loan, a new note and mortgage being given to the bank at the legal rate, can the borrower plead usury on account of the original transaction?

I do not think so. The Supreme Court in the case of *Thompson v. First State Bank of Dawson*, 99 Ga. 651, held that:

"Where the lender of money neither charges nor receives any more than the legal rate of interest, the fact that the money was, with his knowledge, borrowed for the purpose of paying a debt infected with usury due by the borrower to a third person, does not make the loan usurious."

Contract Requiring That Part of 8 Per Cent. Loan Be Kept on Deposit with Lender Makes Loan Usurious.

Is an eight per cent. loan usurious where the bank requires the customer to maintain a balance equal to twenty-five per cent. of the amount of the loan?

In the case of *Cooper v. National Bank of Savannah*, the Court of Appeals of this State reviewed the authorities on the subject and quoted approvingly this rule from the American & English Encyclopedia of Law:

"In the case of loans or discounts by a bank at the highest legal rate of interest, a provision that the proceeds of the loan or discount or any part thereof shall be kept as a deposit in the bank during the period or a portion of the period of the loan renders the transaction usurious, for the reason that the borrower thus pays interest on money which he does not receive or have the use of. But the fact that the borrower voluntarily allows a part of the loan to remain on deposit with the banker, without any agreement therefor, will not constitute the giving or taking of usury, though such deposit is made with the expectation by the borrower that he will thereby be enabled to obtain further loans more readily."

Other authorities are quoted, and the conclusion is definitely announced that:

"If the requirement of the lender that the borrower should maintain such a deposit was in fact merely a scheme or device by which the usurious intent could be concealed, then the transaction would be illegal, whatever its form." *Cooper v. National Bank of Savannah*, 21 Ga. App. 356.

This expresses clearly the law on the subject.

Advising Customers That Rates of Interest Are Based on Balances Does Not Make Loan Usurious.

If in a general way a bank should require borrowers to carry balances on deposit in order to entitle them to loans, would such requirement cause a loan made under such conditions to be regarded as usurious?

I do not think that a general requirement that borrowers should carry balances, and that rates of interest would be fixed in accordance with such balances, would be sufficient to render the contract usurious, although a rate of 8 per cent. was made for a particular loan. The question would be different if the borrower was required to maintain a fixed balance, and not allowed to check against that balance, or was not permitted to reduce his balance

below a given figure. I do not think a loan would be considered usurious where a bank at the time the loan is made advises the customer that he would be expected to carry a balance, and that in consideration of his doing so a particular rate is agreed upon, even though the loan is made at eight per cent.

Commissions Paid to Closely Allied Bank for Negotiating Loan, Would Constitute Usury.

Where a savings bank, whose charter gives it the right to negotiate loans and charge a commission, is operated in connection with a national bank, would it render the transactions usurious for it to charge a commission for handling loans made by the national bank?

It would be of very doubtful propriety to charge a commission for a loan negotiated from the national bank with which the savings bank is connected; and, of course, if the national bank had any interest, directly or indirectly, in the commission charged, the loan would be usurious. I hardly see how, where one of the customers of the national bank applied for a loan, it could negotiate the loan through the savings bank and allow the savings bank to charge a commission. Even if the application was made in the first instance to the savings bank, it certainly seems an evasion of the usury law to pay the savings bank a commission for negotiating a loan with its own officers or with the officers of a closely allied institution.

The Code provides that where the lender neither takes nor contracts to take more than lawful interest, the loan is not rendered usurious by money paid or agreed to be paid others by the borrower in order to obtain the loan. Park's Ann. Code, § 3437. But if the commissions are shared in by the lender, the loan, of course, becomes usurious. With two banks occupying the same banking house, officered by the same people, and closely connected in every way, the national bank would have a rather difficult task to show that the commission paid was for any real service rendered by the savings bank and was not a part of the interest charged.

Usury Can Be Pleading Even Against *Bona Fide* Holder.

The payee of a note tainted with usury sells it to a bank for the amount of the principal without interest. Can the borrower plead usury?

The Supreme Court has held:

"The defense of usury is good even against a *bona fide* holder of a negotiable promissory note, who acquired the same before its maturity." *Atlanta Savings Bank v. Spencer*, 107 Ga. 630.

As there was usury in the original transaction, the note was given for an illegal consideration, and under this decision usury could be pleaded against the bank even if it is a *bona fide* holder. There are many cases to the same effect. See *Campbell v. Morgan*, 111 Ga. 200; *Clark v. Havard*, 111 Ga. 242; *Russell v. Turner*, 14 Ga. App. 344; *Angier v. Smith*, 101 Ga. 844.

Debtor May Recover Usury Paid.

As usury is a personal plea, if the borrower does not avail himself of the defense of usury before he pays a note, can he maintain a suit for the recovery of usury paid?

It is true that usury is a personal plea. I am unable to see, however, that this has anything to do with the question whether a debtor can recover a usurious payment after it has been made. When the law says that usury is a personal plea, it means simply that nobody but the debtor can plead it.

A debtor who has paid a note can recover any usurious interest which is a part of the amount paid. This is covered by § 3436 of Park's Ann. Code, which provides that it shall not be lawful for any person to reserve, charge or take for any loan or advance of money or forbearance to enforce the collection of any sum of money, any rate of interest greater than eight per cent., and § 3438, as amended by the Act of 1916, which provides:

"Any person, company or corporation violating the provisions of section 3436 shall forfeit the entire interest so charged or taken or contracted to be reserved, charged, or taken." Park's Ann. Code, Supp., § 3438.

Section 3441 is as follows:

"Any plea or suit for the recovery of such forfeiture shall not be barred by lapse of time shorter than one year."

It thus appears that a suit can be maintained for the recovery of usury which has been paid by the debtor. The only limitation

upon the right to recover is, that the suit for the recovery must be brought within one year.

A State Bank in Georgia Can Not Discount Paper by Reserving Interest at the Highest Rate Permitted by the Georgia Statute.

Can a state bank deduct interest in advance from a loan made at the rate of eight per cent. per annum?

The question has been decided by the Supreme Court of Georgia:

"The reserving of interest in advance by a bank at the highest legal rate of interest on a loan, whether it be a short or long term loan, is usurious." *Loganville Banking Company v. Forrester*, 143 Ga. 302.

Under this decision, banks organized under the laws of Georgia can not deduct interest at eight per cent. in advance even on short time loans.

Section 19, Article 19, of the Banking Act of 1919, § 163, which authorizes a bank to charge interest at not exceeding eight per cent. per annum, makes no change in the law.

Discount of Note by Third Party at More Than Lawful Rate Is Not Usurious.

Where a promissory note is sold with indorsement by the payee and the discount amounts to more than the lawful rate of interest, is the transaction usurious?

The precise question has been decided by the Supreme Court of Georgia in the case of *Campbell v. Morgan*, 111 Ga. 200, from which I quote:

"When the payee of a negotiable promissory note sold it outright to another, the mere fact that the seller indorsed the paper did not place him in the attitude of a borrower of money from the purchaser, nor as between the latter and the maker of the note was the transaction usurious, because the discount amounted to more than the maximum lawful rate of interest."

I also quote from the case of *McCall v. Herring*, 116 Ga. 242:

"It is perfectly clear that in pure discount or the absolute purchase by one of the promissory note of another, laws relating to usury ought not to apply, for the reason that one may give such a price in the purchase of a promissory note of an individual as

he may see fit, just as he may for a horse or other article of personal property. In that case the note put on the market by the maker represents property which the maker wishes to sell; and if one choose in open market to buy it, the price concerns no one except the owner and the purchaser. Such a transaction is not, however, the loan of money."

It should be borne in mind, however, that the National Bank Act prescribes different rules with regard to usury so far as national banks are concerned. The Supreme Court of the United States, in the case of *National Bank of Gloversville v. Johnson*, 104 U. S. 271, 26 L. Ed. 742, held:

"A national bank is liable at the suit of the indorser to the penalties imposed by §§ 5197 and 5198 of the U. S. R. S. for discounting business paper transferred to it by indorsement imposing the ordinary liability upon the indorser, at a greater rate of interest than seven per cent. *per annum*. To buy or purchase a debt is always in commerce termed to discount it. Discount is the difference between the price and the amount of the debt."

In this case the Supreme Court says it is possible that the transfer of a note by indorsement may be distinguished from cases where the title to the paper is transferred by indorsement without recourse or by mere delivery. The court decline to express an opinion upon such a transfer. It has been held, however, by a number of the State courts in States having laws substantially the same as the National Bank Act on the subject of usury and by the United States Circuit Court of Appeals for the Third Circuit, "That a discount without indorsement at more than the lawful rate is usurious." I quote from *Danforth v. National State Bank*, 48 Fed. Rep. 271, a case decided by the United States Circuit Court of Appeals for the Third Circuit:

"The purchase of accepted drafts by a national bank from the holder without his indorsement at a greater reduction than lawful interest on their face value is a discounting of those drafts, within the meaning of Rev. St. U. S., § 5197, which prohibits such bank from taking interest on any loan or discount made by it at a greater rate than is allowed by the laws of the State where it is situated."

My conclusion is, therefore, that a State bank in Georgia may purchase a note offered to it at any price which the seller may agree to take for it, and whether the note is indorsed or transferred without recourse or merely by delivery, the transaction is not usurious; but a national bank cannot purchase a note at a greater rate of discount than the legal rate of interest, no matter whether it is transferred by indorsement, without recourse, or

by mere delivery, without being liable for the penalties provided by the National Bank Act for charging usury.

VOLUNTARY DEED.

Whether Deed Reciting a Nominal Consideration and Love and Affection Is Voluntary Depends on Intention of the Parties.

Is a deed reciting a nominal consideration of, say, \$5.00, and love and affection, to be regarded as a deed of bargain and sale for a valuable consideration or a deed of gift? The question being important for the reason that a married woman cannot sell her property to her husband unless the sale be approved by the judge of the Superior Court, but she can make to her husband a valid gift of her property.

The rule as announced by the Supreme Court in the case of *Shackelford v. Orris*, 135 Ga. 29, is:

"Whether a deed which expresses as a consideration love for the grantee and a small sum of money is a voluntary conveyance depends upon the intention of the parties; and this intention is to be ascertained by an inquiry into all the facts and circumstances at the time of its execution, which will throw light upon the question as to whether the deed was executed as the consummation of a sale or as the evidence of a gift. *Martin v. White*, 115 Ga. 866 (42 S. E. 279)."

To the same effect is *American Insurance Company v. Bagley*, 6 Ga. App. 736.

Voluntary Deed, Though Recorded, Void as Against Purchaser Without Notice.

A wife makes a deed of gift of her property to her husband. The deed is properly recorded. Subsequently she sells the property to a *bona fide* purchaser who has no actual notice of the deed to the husband. Which deed is superior, that of the husband or of the purchaser?

Under the Georgia law, a wife may not sell her property to her husband unless the sale is approved by an order of the Superior Court, but she can make valid a gift of her property to her husband without such approval. Park's Ann. Code, §§ 3009, 3010. But a voluntary deed, whether made by a married woman or any other person, is void as against subsequent *bona fide* purchasers for value without notice. This notice must be actual. Con-

structive notice by the record of the deed is not sufficient, the registry laws only applying to conveyances based upon consideration. This is expressly provided by § 4110, Park's Ann. Code, and as said by Mr. Justice Cobb in *Martin v. White*, 115 Ga. 867:

"It is the settled law of this State that a voluntary conveyance is not within the operation of the laws providing for the registry of deeds, and that, therefore, the recording of such a conveyance is not notice to a subsequent purchaser for value."

Therefore, if the purchaser had no notice save that from the record of the prior voluntary deed to the husband, his rights would be superior to such deed.

VOTING BY PROXY.

Directors Cannot Vote by Proxy.

Can a director of a bank vote at a directors' meeting by proxy?

No; the directors of a corporation cannot vote at a directors' meeting by proxy, but must be personally present and act for themselves.

WAREHOUSE RECEIPTS.

Transferee or Pledgee of Receipts How Far Protected Against Liens on Cotton Stored.

To what extent is the holder of warehouse receipts pledged as collateral security protected against liens on the cotton?

The pledge of a warehouse receipt as security for a loan transfers to the pledgee the title to the cotton pledged, the holder of the receipt standing in the same position as though the cotton itself had been turned over to and was held by him. While ordinarily the delivery of personal property is essential to its pledge, the Code provides:

"* * * Promissory notes and evidences of debt, warehouse receipts, elevator receipts, bills of lading, or other commercial paper, symbolic of property, may be delivered in pledge." Park's Ann. Code, § 3528.

Construing this section, the Supreme Court has held that:

"The transfer or surrender of warehouse receipts or other symbols representing cotton may very properly be regarded as

equivalent to an actual, physical delivery of the cotton itself, and, therefore, will operate as a constructive delivery passing title." *Central Company v. Exchange Bank*, 101 Ga. 353.

And quoting again:

"It is plainly established now that when warehouse receipts for cotton or other goods are delivered in pledge, the legal effect of such delivery is to put in the possession of the pledgee the property described in such receipt." *Citizens Banking Company v. Peacock*, 103 Ga. 171.

It was also held in the case last cited:

"The pledgee of a warehouse receipt given as collateral to secure the payment of a debt for money loaned to the pledgor, has a special property in the cotton represented by such warehouse receipt, and can maintain an action of trover against the warehouseman to recover the cotton represented in the receipt, when on demand the latter fails or refuses to deliver the cotton for which such receipt was issued." *Citizens Banking Company v. Peacock*, 103 Ga. 171 (6).

But while the transfer of a warehouse receipt puts the title to the cotton in the transferee, the warehouse receipt is not such a negotiable instrument as that a *bona fide* holder for value will be protected against equities and claims against the pledgor, as he would be in the case of a promissory note or other negotiable instrument. In other words, the pledgee of the warehouse receipt occupies the same position and has the same rights, but no greater rights than he would if the cotton itself was actually delivered to him. This is well expressed by the Court of Appeals:

"The transfer of warehouse receipts and similar paper, symbolic of property, operates to transfer the title to the property when it is so intended, but it gives to the holder of the receipt no higher rights than if the property itself had been physically transferred, sold or delivered." *Booze v. Neal*, 6 Ga. App. 279.

What, then, is the status of a *bona fide* purchaser of cotton with regard to liens thereon? It has been repeatedly held that such a purchaser of personal property, without notice of statutory liens which have not been foreclosed, takes the property freed of such liens. Quoting from a few of the cases:

"A *bona fide* purchaser of the absolute title to personal property without notice of any unforeclosed statutory lien upon it takes the same divested of any such lien. Our statutory lien laws secure priority of judgment to favored classes of debts out of certain property of the person who incurred the debts. When such property passes into the hands of a *bona fide* purchaser without notice and before foreclosure, it is no longer the property of the person incurring the debt, and not having gone into the pos-

session of one affected with notice the lien is lost." *Frazer v. Jackson*, 46 Ga. 621.

"A *bona fide* purchaser, without notice, of a crop grown on rented premises will be protected against the lien, general or special, of the landlord for rent." *Thornton v. Carver*, 80 Ga. 397.

And to the same effect: *Holmes v. Pye*, 107 Ga. 784.

"The lien of a laborer on the property of his employer will not prevail against a purchaser who buys before foreclosure of the lien, and without notice." *Beall v. Butler*, 54 Ga. 43.

And it has been held that a warehouseman who, without notice of a lien, makes advances on cotton produced on rented land and stored with him by the tenant has such a qualified property in the cotton as to entitle him to reimbursement for such advances and pay for warehouse charges before the landlord can enforce his claim for rent. *Clark v. Dobbins*, 52 Ga. 656.

The transfer of a bill of lading issued by a railroad or other carrier transfers the title to the property shipped and covered by the bill of lading, as does the transfer of a warehouse receipt, and it has been several times held that the title of the transferee is superior to subsequent liens against the transfer of the bill of lading. *National Bank v. Everett*, 136 Ga. 372; *Farmers Bank v. Allen Holmes Co.*, 122 Ga. 67; *American National Bank v. Lee*, 124 Ga. 863.

Not only is the holder of a warehouse receipt protected against unforeclosed statutory liens against the pledgor, of which he has no notice, but he has a qualified title to the property, which can not be affected by any act of the pledgor or by the warehouseman issuing the receipt. I quote again from the Court of Appeals:

"The pledgee of warehouse receipts, receiving the same as collateral upon a *bona fide* loan or discount of commercial paper, stands in the same privileged position as a *bona fide* purchaser for value of the property represented by the receipts.

"The *bona fide* pledgee for value of a warehouse receipt is vested with an indefeasible title to the property of which the receipt is symbolic. This title cannot be affected or incumbered by any act of the pledgor or warehouseman, and is subject to defeasance only by the payment of the debt secured by the receipt." *Bank of Sparta v. Butts*, 4 Ga. App. 308.

But while the transferee or pledgee of the warehouse receipt is protected as against statutory liens, of which he has no notice, and while the pledgor cannot defeat his title by any subsequent act, the transferee's title is subject to mortgages and other

recorded liens against the cotton to the same extent as though he were the purchaser of the cotton itself, although he may have no actual knowledge of the existence of such mortgages, the record being notice thereof.

A growing crop may be mortgaged in Georgia. Stephens *v.* Tucker, 55 Ga. 544. Indeed, mortgages on crops given to secure the payment of debts for money, supplies, and other articles of necessity, including live stock, to aid in making and gathering such crops, are favored under our Code, and are superior even to judgments of older date than such mortgages, and this is so whether they are recorded or not. Park's Ann. Code, § 3349; Franklin *v.* Callaway, 120 Ga. 382.

Where a mortgage is given on a crop and duly recorded, the mortgage creditor would have the right to follow the cotton into the hands of a purchaser, the record of his mortgage being constructive notice, and, therefore, preventing the purchaser from being such a *bona fide* purchaser as that he would take the property freed of the lien. Not only has the owner of a crop the right to mortgage it, but even a cropper, or one cultivating the crop on shares, has a mortgagable interest in the crops which he is cultivating, and any purchase of the crop would be subject to the lien of a mortgage given by a cropper. Fountain *v.* Fountain, 7 Ga. App. 361.

In the case last cited, it was also held that an unrecorded mortgage on a growing crop made by a cropper could not be defeated by applying the mortgage property to an indebtedness existing at the time the mortgage was made, even though with the consent of the tenant and to one without actual notice of the mortgage. The court saying:

"The general rule is that one who takes property in discharge of an existing indebtedness is not regarded as a purchaser for value, and it is only as to such a purchaser that an unrecorded mortgage on personalty is invalid."

Again, a judgment, where properly entered on the general execution docket, is a lien on all the property of the defendant, both real and personal. Park's Ann. Code, § 5946.

As a defendant could not sell his cotton freed of the lien, he could not pledge a warehouse receipt for the cotton, so as to give to the pledgee title to the cotton superior to the judgment.

It should be remembered, too, that a warehouse receipt is only a symbol of the property covered by it, and that the transfer of such receipt is mere constructive delivery of the property, and,

therefore, where there can be no actual delivery of the property, because it is not then in the warehouseman's possession, the constructive delivery will not suffice to transfer title. *Livingston v. Anderson*, 2 Ga. App. 274; *Commercial Bank v. Flowers*, 116 Ga. 219.

Except as to negotiable instruments, a seller can convey no better title than he has himself. Park's Ann. Code, § 4118. Therefore, the transfer of a warehouse receipt covering stolen cotton, or other cotton to which the depositor has no title, will not convey title to the transferee.

Under our statute, cotton, corn, rice and other products sold by planters and commission merchants on cash sale, do not become the property of the buyer until fully paid for, although they may have been delivered to the buyer. Park's Ann. Code, § 4126. And the Supreme Court has held under this section:

"Under the law of this State, where there is a delivery of cotton by a planter or commission merchant 'on cash sale,' the title of the seller remains undivested until payment in full of the purchase price, and may be asserted by him even as against a *bona fide* purchaser from his vendee." *Flannery v. Harley*, 117 Ga. 483.

To summarize: The pledgee or transferee of a warehouse receipt is regarded as a *bona fide* holder of the property covered by the receipt. His title can not be affected by any subsequent claims or liens against the pledgor or transferrer or by any act of the pledgor or of the warehouseman issuing the receipt. His title is superior to statutory liens, such as the general or special lien of landlords for rent or for supplies furnished, the liens of laborers, or other liens of similar character, but it is inferior to a duly recorded mortgage or bill of sale to secure debt, and to judgments where properly entered on the general execution docket. The transferee or pledgee of a warehouse receipt gets no title as against the true owner of the property covered by the receipt, where the property has been stolen, or in the case of farm products sold by farmers or commission merchants, where it has been sold for cash and not paid for.

Cotton Levied On Under Judgment Against Tenant or Cropper—Rights of Parties.

A landlord secures a loan from a bank, pledging as collateral warehouse receipts for cotton, the receipts being issued jointly to the landlord and tenant. A common law *fi. fa.* against the tenant is levied on the cotton covered by the warehouse receipts, the judgment creditor claiming that one-half of the cotton belongs to the tenant. What are the relative rights of the bank, the warehouseman, and the judgment creditor?

The question depends largely on whether the person designated as tenant was a tenant or a cropper. Under the Code:

"Where one is employed to work for part of the crop the relation of landlord and tenant does not arise. The title to the crop, subject to the interest of the cropper therein, and the possession of the land remain in the owner." Park's Ann. Code, § 3707:

The Code also provides:

"Whenever the relation of landlord and cropper exists, the title to and right to control and possess the crops grown and raised upon the lands of the landlord by the cropper, shall be vested in the landlord until he has received his part of the crops so raised and is fully paid for all advances made to the cropper in the year said crops were raised to aid in making said crops." Park's Ann. Code, § 3705.

A judgment or lien against the cropper cannot be levied on his part of the crop until the landlord has been paid. Therefore, if in the case under consideration this cotton was raised by a cropper, and there has been no final settlement between the landlord and the cropper, and no final division of the crop, the judgment against the cropper cannot be levied on the cotton, and the landlord, or the bank, as the holder of the warehouse receipts which carry with them the title to the cotton could claim the cotton and defeat the judgment creditor of the cropper. If, on the other hand, the relation of landlord and tenant existed, the title to the tenant's part of the crop would vest in him and not in the landlord, and if any part of the cotton covered by the warehouse receipts belonged to the tenant it would be subject to levy and sale for the tenant's debts. Of course, the landlord, if he has not been paid his rent for the year, could protect himself by suing out a distress warrant and foreclosing a lien, the landlord's lien for rent on the crops raised on the lands being superior to judgment liens against the tenant. Park's Ann. Code, § 3701.

The bank as the holder of the warehouse receipts is in the same position as though it held the cotton itself, the Code recognizing the right to pledge warehouse receipts, and it having frequently been held that the pledgee of warehouse receipts is a *bona fide*

holder of the property covered by the receipts. As stated by the Supreme Court:

"The transfer or surrender of warehouse receipts, or other symbols representing cotton, may very properly be regarded as equivalent to an actual physical delivery of the cotton itself, and, therefore, will operate as a constructive delivery passing title." Central Company *v.* Exchange Bank, 101 Ga. 353.

I do not think that the warehouseman has any particular interest in this controversy. To the extent of the storage charges, or actual advances made against the cotton, the warehouseman's lien would be superior to the judgments against either the landlord or the cropper, or the tenant as the case may be.

The Phrase "Customary Charges and Advances" Does Not Include Advances Made by Warehouseman.

A warehouse receipt has in it the clause, "deliverable on the payment of all customary charges and advances." When the receipt is hypothecated with a bank, can the warehouseman hold the cotton for past advances, and continue to advance on it, though the party storing the cotton does not present the receipt or have the advances noted thereon?

The warehouseman under the circumstances cannot hold the cotton as against the bank, if nothing more appears on the face of the receipt than the clause quoted. This precise question has been decided by the Court of Appeals of Georgia, from whose decision I quote:

"The title to property represented by warehouse receipts becomes vested in the *bona fide* pledgee for value, and this title cannot be defeated or incumbered by any act of the warehouseman, nor by any act of the pledgor. The pledgee has not only a lien on the property represented by the receipt, for his advances, but he has an absolute title to the property, which is indefeasible except by payment of the debt.

"It is contended in this case that the statement in the warehouse receipt, that the cotton which it represents is only deliverable to the holder of the receipt on payment of "customary charges and all advances," is sufficient to put anyone who takes it on notice that any advance made on the cotton will have to be paid before the cotton can be demanded. These general words are printed in the receipt with a blank space left for the statement of the amount of the advances; and in the present case no amount is inserted in the receipts. We think that where warehouse receipts containing these words are pledged as collateral security, they do not convey notice to the pledgee that any advances have in fact been made, or that the pledgee would be required to pay

any advances which may have been made or will be made on the cotton represented by the receipts. If, when the pledgee took the receipt as collateral, it contained a definite statement that, in addition to the customary charges, such as storage and insurance, a certain sum stated had been advanced to the pledgor, on the cotton, the pledgee would take it subject to that advance. It was the duty of the warehouseman, when he issued the receipt, if he had made an advance to the owner of the cotton at that time, to so state in the body of the receipt; and if he subsequently advanced to the owner any money for supplies, on the cotton in his possession as warehouseman, he should have required the production of the receipt and have entered thereon a statement of such advance. Any other rule would render warehouse receipts worthless as collateral security. It would enable the pledgor and the warehouseman to perpetrate a fraud on the pledgee, against which he would have no protection. A mere inquiry made by the pledgee of the pledgor, at the time of the pledge, as to the fact of advances would furnish no protection to the pledgee; and to require that the pledgee should go to the warehouseman and inquire as to the fact of advances would be wholly unreasonable. The receipt itself should bear upon its face the definite expression of the fact of advances. If advances have been made, it should so state specifically; and if not so stated, the pledgee is protected. Of course, after the pledgee obtains possession of the receipts, the title to the property thereby represented is in him, and cannot be incumbered by any act, as before stated, of the warehouseman or the pledgor." *Bank of Sparta v. Butts*, 4 Ga. App. 308, 311, 312.

I think this covers very clearly the question. It should be noted that under this decision such a general statement in the receipt covers charges necessary to the protection of the property, such as storage and insurance, but it covers nothing else.

Right of Pledgee of Warehouse Receipt to Sell Property Covered Thereby.

Is a bank which holds, as collateral security for advances made for the purchase of cotton, warehouse receipts for the cotton purchased, authorized to sell the cotton so held in pledge in the absence of a special contract giving it such right?

Under § 3528, Park's Ann. Code, warehouse receipts, bills of lading, and similar paper symbolic of property, may be delivered in pledge, the delivery of the receipt placing the holder in the same position as though the cotton itself had been delivered to him. But a pledgee has no right to sell the property pledged until after the debt for which it is pledged becomes due, and he must

always give notice for thirty days to the pledgor of his intention to sell, and the sale must be in public and to the highest bidder. § 3530, Park's Ann. Code.

These sections have been held by the Supreme Court to apply to the holder of warehouse receipts as collateral. *Citizens Banking Co. v. Peacock*, 103 Ga. 171, 179.

Therefore, in the absence of a special contract authorizing the sale of the cotton, a bank holding warehouse receipts as collateral would have to wait the maturity of its debt before selling, and could only sell then after thirty days' notice, and the sale would have to be at public outcry to the highest bidder. Banks usually avoid this by taking a collateral form note which authorizes the sale of the collateral in the event the maker of the note fails when called on to deposit additional collateral. Many of the banks have a special cotton contract, which provides that a definite margin of so many dollars per bale shall be maintained, and in the event such margin is not maintained the bank has the right to sell the cotton at private sale and without notice to the pledgor.

YEAR'S SUPPORT.

Year's Support Is Superior to Claim of Creditor on Collateral Pledged.

Is the year's support allowed to a widow and minor children out of the property of the deceased husband and father superior to the claim of a creditor on collateral security pledged for the payment of a promissory note or other indebtedness?

Yes; this has been distinctly ruled by the Supreme Court in the case of *Ullman v. Brunswick Title Guarantee & Loan Co.*, 96 Ga. 625.

It is also superior to the claim of a mortgage creditor. *Cully v. Bloomingdale*, 68 Ga. 756.

Year's Support Is Inferior to Deed to Secure Debt.

Is a deed to secure debt under section 3306, et seq., of the Code of 1910, good as against a claim for year's support, where no bond for title, as provided for in that section, is given?

The precise question has been decided by the Supreme Court in the case of *Williamson v. Orient Insurance Company*, 100 Ga. 791, from which I quote the first headnote:

"Though a deed to realty purporting upon its face to have been made for the purpose of securing a debt, and reciting that it was executed under the provisions of § 1969 of the Code of 1882 (Code of 1910, § 3306) did not fall strictly within the provisions of that section, for the reason that there was no bond to reconvey upon the payment of the debt, yet if such deed by its express terms conclusively manifested an intention on the part of the maker to pass title to the grantee and contained no defeasance clause or other language authorizing it to be construed as a mortgage only, the mere reference in the deed to the section above mentioned and the grantee's failure to execute and deliver to the grantor a bond for titles did not affect the efficiency or validity of the paper as an instrument passing title but its effect was to pass title to the grantee."

As a year's support can only be set apart out of property the title to which is in the husband and father, and as title, as held by the Supreme Court, is in the creditor, the grantee, and not in the grantor in the deed to secure debt, no year's support can be set apart out of the property. A year's support is superior to a mortgage, but this is because a mortgage in Georgia does not convey title but is only a lien. A year's support is superior to a lien, but cannot be taken in property, title to which has been conveyed, though only as security for a debt.

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